(22,561)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 535.

THE MICHIGAN CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print
Caption	1	1
Petition	2	1
Summons	8	5
Answer	10	6
Motion to appoint commissioner	13	8
Reply	16	10
Cause passed	18	11
Jury sworn and trial commenced	18	11
Trial concluded; verdict for plaintiff for $12,000	19	11
Verdict	20	12
Motion for new trial	21	12
Motion for new trial submitted	22	13
Opinion on motion for new trial	23	14
Motion for new trial overruled	27	16
Bill of exceptions	28	17

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	Original.	Print
Evidence for plaintiff	31	18
Testimony of D. S. Sutherland	31	18
Elmer J. Birdsell	40	24
Edward J. Kearsley	55	33
Daniel B. Vreeland	61	37
Mrs. L. Wisemiller	61	37
Copy of Michigan statute	66	40
Evidence for defendant	69	41
Testimony of Dr. Frank E. Tinker	69	41
Motion of defendant to direct verdict	74	44
Charge of the court	77c	47
Exceptions to the charge	83	50
Judge's certificate to bill of exceptions	87	52
Order allowing bill of exceptions	89	53
Petition for writ of error	90	53
Assignment of errors	92	54
Order allowing writ of error	97	57
Bond on writ of error	98	57
Order extending time	102	60
Writ of error	103	61
Return of clerk on same	104	61
Citation	105	62
Return of marshal of service	106	62
Certificate	107	63

1 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

Record of the Proceedings of the Circuit Court of the United States within and for the Western Division of the Northern District of Ohio in the Cause and Matter hereinafter stated, the Same being finally disposed of at a Regular Term of said Court begun and held at the City of Toledo, in said District on the First Tuesday in June, being the Seventh Day of said Month in the Year of Our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States of America the 135th, to wit: On the 5th Day of December, A. D. 1910.

Present, the Honorable John M. Killits, United States District Judge.

No. 2187. Equity.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Said action was commenced on the 5th day of February, A. D. 1910, and proceeded to final disposition at the term and day above written, and during the progress thereof Pleadings and Papers were filed, Process was issued and returned, and Orders of the Court were made and entered in the order, and on the dates hereinafter stated, to-wit:

2 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Petition.

Plaintiff says that he is a citizen and resident of Lucas County, State of Ohio. That Albert Wisemiller, late a citizen and resident of Wayne County, Michigan, is now deceased, and that plaintiff has been duly appointed by the probate court of said county as administrator of his estate, has qualified and is now acting as such administrator. That the defendant is a railroad corporation organized and existing under the laws of the state of Michigan, and is a citizen

and resident of the state of Michigan. That the amount involved in this action amounts to Twenty Thousand Dollars.

Plaintiff further says that on the 5th day of October, 1909, the defendant was a common carrier by railroad, engaged in interstate commerce, carrying freight, merchandise and railroad cars between the state of Michigan and the various other states and territories of the United States.

That on said day the said decedent Albert Wisemiller was in the employ of the defendant as a locomotive engineer, and under the direction of the defendant was operating a locomotive engine which was drawing about fifteen freight cars over defendant's line of railroad in a northerly direction in the state of Michigan. That said train contained cars which were being transported from states and territories of the United States outside of the state of Michigan and into the state of Michigan. That said cars in said train con-
3 tained merchandise which was being transported from states and territories outside of the state of Michigan into said state of Michigan.

Plaintiff further says that at said time the defendant was operating over said line of railroad, another train, south bound, known as Extra No. 8101, the same being an extra freight train engaged in interstate commerce, and containing cars and merchandise which were being transported by the defendant from points in said state of Michigan to other states and territories of the United States. Plaintiff says that he does not know, and is unable to ascertain, the points from which and to which any of said merchandise and cars were being transported by the defendant, but that said fact is well known to the defendant.

Plaintiff says that each of said trains was being operated by the defendant in interstate commerce.

Plaintiff further says that on the said 5th day of October, 1909, it was provided by the laws of the state of Michigan, which were then in full force and effect, as follows, to-wit: That every common carrier railroad company in said state shall be liable to any of its employees, or in case of his death to his personal representative, for the benefit of his widow and children, if any, if none then for his parents, if none then for his next of kin, for all damages which may result from the negligence of any such railroad company, or from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to the negligence of any such common carrier railroad company, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, coal docks, or other equipment.

Plaintiff further says that at said time decedent was working on what is known as a regular freight train, and that by the rules and customs of the defendant company, said train had the right as against said south bound train, to occupy the main track of said road at a station called Carpenter. That the defendant,
4 through its officers and agents who are to plaintiff unknown, but well known to the defendant, and who were the superiors over the decedent, ordered and directed the said decedent to

operate said train to said station of Carpenter on defendant's line of road, and there meet and pass said extra freight train No. 8101, which was being operated by the defendant in a southerly direction over said track. That the defendant, through its officers and agents, had ordered the said south bound train to take a siding at said station so that the train which was being operated by decedent could pass said south bound train.

Plaintiff says that decedent did operate said engine and draw said cars to said station of Carpenter, and caused the same to come to a stop at said station about 500 feet southerly of the switch that said south bound train should have entered to take said siding.

That while the said decedent's train was so standing on main track waiting for said south bound train to take said siding, that the defendant, its agents and servants in charge of said south bound train, did wrongfully, carelessly and negligently fail to cause said train to enter said switch and siding, for the purpose of allowing the decedent's train to pass the same, but did carelessly, wrongfully and negligently cause and permit said train to be operated in a southerly direction on the track on which the said decedent's train was standing, and come in collision with the engine and cars of the decedent's train.

Plaintiff says that he does not know and is unable to ascertain the various acts of negligence on the part of the defendant, its agents and servants, which concurred with the failure of the persons in charge of said south bound train to take said siding, and which caused and permitted said south bound train to collide with the engine and cars of decedent's train.

5 Plaintiff avers that said collision occurred either by the negligence of the persons in control of and operating said south bound train, in failing to cause the brakes to be set on said train, and by allowing and permitting the same to be operated at a high and dangerous rate of speed, and failing to adopt sufficient means to cause the same to come to a stop before the same had collided with the decedent's engine and cars, or because the defendant negligently and carelessly allowed and permitted the brakes, air connections and other appliances with which the engine and cars of said south bound train were equipped, to become and remain old, defective and worn out, so that the persons operating said train were unable to cause the same to come to a stop before said collision.

Plaintiff does not know and is unable to ascertain which of said acts of negligence concurred with the failure of the persons in charge of said south bound train to take said siding, and caused said collision, but avers that the same is well known to the defendant. That plaintiff does not know, and is unable to ascertain the nature of any of the defects in said engine, cars and appliances, if there were such defects, but avers that the same are well known to the defendant.

Plaintiff further says that by reason of said south bound train colliding with the cars and engine of decedent's train, the engines of said trains were crushed together and the forward cars in said

trains were broken and derailed, and decedent was crushed between the parts of said engines and cars and thrown from the same, and by reason thereof sustained injuries which resulted in his death directly thereafter. Plaintiff says that decedent did not know and had no means of knowing that the said south bound train would not be run upon said siding, or of any of the defects which might be in said engine and cars and equipment in said south bound train, or that the said train would collide with the train on which he was at work. That decedent was without fault on his
6 part contributing to the injuries which he received, but that the same were received solely through the negligence of the defendant, its officers, agents and servants, as hereinbefore set forth.

Plaintiff further says that the decedent was a strong, able-bodied and skillful locomotive engineer, aged 45 years, and was at said time earning large wages, and capable of earning large wages.

That the decedent left Libbie Wisemiller, his widow, surviving him, who was dependent upon the said decedent for her support.

That by reason of the negligence of the defendant, its officers, agents and servants in causing the death of the said Albert Wisemiller, the said Libbie Wisemiller, his widow, has suffered damages in the sum of $20,000.00.

Wherefore plaintiff prays judgment against the defendant in the sum of $20,000.00, for costs and all other proper relief.

DANIEL B. VREELAND,
Adm'n'r Est. Albert Wisemiller, Dec'd.
By CHARLES A. THATCHER,
His Attorney.

STATE OF OHIO,
Lucas County, ss:

Daniel B. Vreeland, being duly sworn, says that he is the plaintiff in the foregoing action; that the allegations contained in the foregoing petition are true, as he verily believes.

DANIEL B. VREELAND,
Adm'n'r Est. Albert Wisemiller, Dec'd.

Subscribed and sworn to before me this 1st day of February, 1910.
[NOTARIAL SEAL.] RALPH GAMBLE,
Notary Public, Lucas County, Ohio.

7 *Præcipe.*

To the Clerk:

Issue summons for the above named defendant, addressed to the Marshal of this court, returnable according to law.

Endorse on same: "Action for money only; amount claimed $20,000.00."

CHARLES A. THATCHER,
Attorney for Plaintiff.

Filed Feb. 5 1910. B. C. Miller, Clerk U. S. Circuit Court, N. D. O.

(Endorsement:) No. 2187. U. S. Circuit Court, N. D. O., W. D. Daniel B. Vreeland, Adm'r Est. Albert Wisemiller, Dec'd, Plaintiff, vs. M. C. R. R. Co., Defendant. Petition. Filed Feb. 5, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

8 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Northern District of O[illegible]greeting:

You are hereby commanded to notify Michigan Central Railroad Company, that it has been sued by Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, in the Circuit Court of the United States, within and for the said Division and District, and that unless it answers by the 5th day of March, A. D. 1910, the Petition of the said Plaintiff against it filed in the Clerk's Office of said Court, at Toledo, in said district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 14th day of February, A. D. 1910.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this fifth day of February, A. D. 1910, and in the 134th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk*,
By GLENN G. MUNN,
Deputy Clerk.

(Endorsement, when issued:) No. 2187. United States Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Adm'r, vs. Michigan Central Railroad Co. Summons. "Action for money only; amount claimed $20,000.00". Returnable Feb. 14, 1910. Rule for answer March 5, 1910. C. A. Thatcher, Plaintiff's Attorney. $15.00 deposited.

9 (Endorsement, when returned:) U. S. Marshal's No. 3949. The United States of America, Northern District of Ohio, *ss:* U. S. Marshal's Return. Received this writ at Toledo, O., Feb. 5, 1910, and on the same day, at the same place I served it on the within named, Michigan Central Railroad Company by delivering to G. E. Husted, Regular Freight Agent of the said the Michigan Central Railroad Company, personally, a true and certified copy thereof, with all endorsements thereon. The President, Chairman of the Board of Directors or Trustees, Secretary, Treasurer, or other Chief Officers could not be found in my district. Marshal's fees—Service 2.00 Travel .06 $2.06. Hyman D. Davis, U. S. Marshal. By E. A. Brown, Deputy. Returned and filed Feb. 11, 1910. B. C. Miller, Clerk.

10 In the United States Circuit Court, Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Answer of the Michigan Central Railroad Co.

The Michigan Central Railroad Company for answer to the petition of said plaintiff, says:

This defendant as stated in the petition herein is and was at the time of the commencement of this action a corporation organized and incorporated under the laws of the State of Michigan and a resident and inhabitant of said State, and a non-resident of the Northern District of Ohio, Western Division, and of the State of Ohio.

That at the time of the occurrence mentioned in said petition and at the time of the commencement of this action the defendant was and is now a common carrier railroad company owning and operating an interstate railroad running from the city of Detroit in the State of Michigan to the cities of Chicago in the State of Illinois, Toledo in the State of Ohio, and Buffalo in the State of New York, and as such was at said dates engaged in interstate commerce between the states of Michigan, Illinois, Ohio and New York, and is now so engaged.

That at the time of the occurrence menticned in said petition said Albert Wisemiller, decedent, was an engineer in the employ of this defendant, working upon a train of the defendant and was then and there engaged in and employed by said defendant in its interstate commerce.

Said defendant claims and avers that the facts stated in the said petition make and show this is an action arising under a
11 law of the United States, to-wit: The act of congress entitled "An Act Relating to the Liability of Common Carriers by Railroads to their employés in Certain Cases", approved April 22, 1908.

The said answering defendant avers that the said decedent survived the injury of which complaint is made for some several hours after the incedent related in said petition, during all of which time he was conscious of the occurrence and of all the conditions surrounding him, and able to converse with those about him with reference thereto.

On the 22d day of April, 1908, *and* Congress of the United States passed what is known as the "Railroad Company Employers' Liability Act", the first section of which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every com-

mon carrier by railroad engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

That under and by virtue of said Act and decision of the Courts thereon this action did not and does not survive to the personal representative or next of kin of said decedent, nor does any right of action survive.

Said defendant denies, each, all and singular the other averments of said petition not herein specifically admitted or denied, and denies each, all and singular every act of negligence charged against said defendant, its officers, agents, or employés.

12 Said defendant says that whatever injury said decedent sustained was the result of his own negligence and want of proper care, which contributed directly to cause the injury of which he complains.

Wherefore said defendant asks that said petition be dismissed and that it recover its costs in this behalf expended.

POTTER & POTTER,
Attorneys for Defendant.

STATE OF OHIO,
Lucas County, Northern District of Ohio, Western Division, ss:

E. D. Potter being duly sworn according to law, makes oath and says that he is one of the attorneys for the said defendant, The Michigan Central Railroad Company; that said defendant is a corporation, non-resident of the [illegible]hio, and for that reason affiant makes this affidavit. That [illegible]acts stated in the foregoing answer are true as he verily believes.

E. D. POTTER.

Sworn to before me and signed in my presence, this 5th day of March, 1910.

[NOTARIAL SEAL.] JAMES W. HARBAUGH,
Notary Public, Lucas County, Ohio.

(Endorsement:) No. 2187. United States Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Adm'r

of the Estate of Albert Wisemiller, dec'd, Plaintiff, vs. The Michigan Central Railroad Company, Defendant. Filed Mar. 5, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Potter & Potter, Attorneys, Nicholas Bldg. Toledo, O. Answer of the Michigan Central R. R. Co.

13 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiffs,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Motion.

Now comes the plaintiff and respectfully represents to the Court that plaintiff's cause of action arose through the negligence of the defendant company and its servants and agents in the operation of a freight train which collided with the train on which plaintiff's decedent was employed as a railroad engineer, as set forth in plaintiff's petition.

Plaintiff further says that Edward Sliter, Elmer J. Birdsall, Edward J. Kearsley and John Timmerman, and various other servants and agents of the defendant company who were present at the time of said collision and familiar with the facts connected therewith, are residents of the city of Detroit, State of Michigan, which place is within one hundred miles from the place where this action is pending, and are now in the employ of the defendant company.

Plaintiff further says that said witnesses are engaged in either railroad train service or as switchmen in the yards of the defendant company. That said employment is extremely hazardous and that said persons while so employed are continually exposed to the loss of life. That said persons frequently and at various times are required by the defendant company to leave their homes at Detroit Michigan, and go to places more than one hundred miles from the place where this action is pending, to-wit, Toledo, Ohio, and perform services at said places on defendant's line of railroad and remain at said places for indefinite lengths of time.

That plaintiff can not prosecute this action without the evidence of the said persons. That should said persons in the course of their employment, or otherwise, become deceased, it will be impossible for plaintiff to properly prosecute this action and secure the
14 ends of justice. That should plaintiff be unable to take the testimony of said persons, there will be a failure of justice in this action.

That there will also be a delay of justice, in that said persons at the time when this case may be called for trial, are liable to be beyond the jurisdiction of this court, so that their attendance, if they are living, can not be procured by any process of this Court.

That plaintiff's decedent whose death was caused through the negligence of the defendant, left Libbie Wisemiller, his widow, who was dependent upon him for her support. That if plaintiff should fail to properly prosecute this action and secure the necessary evidence to satisfy the court and jury of the liability of the defendant, said widow of the said decedent will be left without means of support.

Wherefore plaintiff moves that an order issue from this court, appointing a commissioner to take the testimony of the various persons above referred to, and directing that the said testimony be filed with the clerk of this court as provided by law.

DANIEL B. VREELAND,
Adm'n'r Est. Albert Wisemiller, Dec'd,
By C. A. THATCHER,
His Attorney.

STATE OF OHIO,
Lucas County, ss:

Daniel B. Vreeland, being duly sworn, says that he, as Administrator of the Estate of Albert Wisemiller, Deceased, is the plaintiff in the foregoing action, that the various allegations contained in the foregoing motion are true.

DANIEL B. VREELAND,
Adm'n'r Est. Albert Wisemiller, Dec'd.

Subscribed and sworn to before me this the 11th day of March, 1910.

[NOTARIAL SEAL.]

RALPH GAMBLE,
Notary Public, Lucas County, Ohio.

15 (Endorsement:) No. 2187. U. S. Circuit Court, N. D. O. W. D. Daniel B. Vreeland, Adm'r Est. Albert Wisemiller, Dec'd, Plaintiff, vs. M. C. R. R. Co. Defendant. Motion. Filed Mar. 12, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. ("Denied. R. W. T. Exactly the same motion could be made if the witnesses all lived in Toledo; exactly the same reasons could be urged in support of it as are urged on this motion. R. W. T.")

16 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Reply.

Now comes the plaintiff and for reply to the answer of the defendant filed herein, says that he admits that Congress passed an Act, which was approved on April 22, 1908, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employés in certain Cases." Plaintiff admits that a copy of the first paragraph or section of said act is set forth in defendant's answer.

Plaintiff denies each and every other allegation in said answer contained, except such matters as are alleged in his petition.

DANIEL B. VREELAND,
Adm'r Est. Albert Wisemiller, Dec'd,
By C. A. THATCHER, *His Attorney.*

STATE OF OHIO,
Lucas County, ss:

Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, plaintiff herein, being duly sworn, says that the allegations contained in the above reply are true, as he verily believes.

DANIEL B. VREELAND.

Subscribed and sworn to before me this the 18th day of March, 1910.

[NOTARIAL SEAL.] RALPH GAMBLE,
Notary Public, Lucas County, Ohio.

17 (Endorsement:) No. 2187. U. S. Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Adm'r, Est. Albert Wisemiller, Dec'd, Plaintiff, vs. M. C. R. R. Co., Defendant. Reply. Filed Apr. 1, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

18 June Term, A. D. 1910, to-wit, September 28, 1910.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187. Law.

DANIEL B. VREELAND, Adm'r,
vs.
MICHIGAN CENTRAL RAILROAD Co.

It is Ordered that this cause be passed until Wednesday, October 5th, 1910, at the costs of the defendant, and that the witnesses that are now in attendance be and they are hereby ordered to appear at that time to attend the trial herein.

June Term, A. D. 1910, to-wit, October 6, 1910.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187. Law.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY.

This day came the parties herein, by their attorneys; also came the following-named persons as jurors, to-wit: Charles Acker, Charles A. Brown, Jerry Coil, F. J. Eggeman, George B. Fuller, Theodore Hauck, Michael Jacoby, Robert Poling, J. W. Sandwisch, H. S. Clapp, John Coonrod, H. G. Ogden, who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence. And the said jury having heard the evidence adduced, and the hour of adjournment having arrived the further hearing of this case was adjourned until tomorrow morning at 9 o'clock.

19 June Term, A. D. 1910, to-wit, October 7, 1910.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187. Law.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY.

This day again came the said parties, by their attorneys and also came the jury heretofore impaneled and sworn, and the trial pro-

ceeded. And the said jury having heard the arguments of counsel, and the charge of the Court, retired to their room, in charge of a sworn officer, for deliberation.

And now comes said jury into open Court with their verdict in writing, signed by their foreman and say: "We, the jury in this case, being duly impaneled and sworn, do find upon the issues joined for the plaintiff, and do assess his damages in the sum of Twelve Thousand Dollars ($12,000.00). George B. Fuller, Foreman."

It is therefore considered by the Court that the said Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, deceased, recover from the said Michigan Central Railroad Company the said sum of Twelve Thousand Dollars, so assessed as his damages herein; and that the said Michigan Central Railroad Company pay the costs of this proceeding, taxed at $—.

20 UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

In the Circuit Court of the United States, June Term, A. D. 1910.

DANIEL B. VREELAND, Adm'r of the Estate of Albert Wisemiller, Deceased, Plaintiff,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Verdict.

We, the Jury in this case, being duly impaneled and sworn, do find upon the issues joined, for the plaintiff and do assess his damages in the sum of Twelve Thousand Dollars ($12,000.00).

GEO. B. FULLER, *Foreman.*

(Endorsement:) No. 2187. Daniel B. Vreeland, Adm'r of the Estate of Albert Wisemiller, deceased, vs. Michigan Central R. R. Co. Verdict. Filed October 7, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

21 In the United States Circuit Court for the Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Motion for New Trial.

Now comes The Michigan Central Railroad Company, the defendant in said above cause, by its attorneys, Frank E. Robeon and Pot-

ter & Potter, and moves the Court here to set aside the verdict of the jury rendered in said above cause and grant new trial for the following reasons:

1. That the Court erred in overruling defendant's motion to arrest the testimony from the jury and direct a verdict in its favor upon and for the several and separate grounds as set forth in its said written motion filed herein.

2. That the Court erred in its charge to the jury in this, that the only question for the jury to consider was the one assessing the damages.

3. That the Court erred in its charge to the jury as to the measure of damages that should govern the jurors in assessing compensation to the widow of said decedent in this, to-wit: that in assessing the probable pecuniary loss or injury which the widow of said decedent sustained, they should take into consideration and include the money value of the loss of her husband's advice, counsel and direction.

4. That the damages awarded are excessive, appearing to have been given under the influence of passion or prejudice.

5. That the verdict is contrary to law.

22 6. Errors of law occurring at the trial and excepted to by said defendant.

FRANK E. ROBSON,
POTTER & POTTER,
Attorneys for Defendant.

Toledo, Ohio, October 8th, 1910.

(Endorsement:) No. 2187. U. S. Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Admr., Plaintiff, vs. The Michigan Central Railroad Company, Defendant. Motion for New Trial. Filed Oct. 8, 1910. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Potter & Potter, Attorneys, 1131 Nicholas Bldg., Toledo, Ohio.

June Term, A. D. 1910, to-wit: November 21, 1910.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187. Law.

DANIEL B. VREELAND, Adm'r,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY.

This cause now coming on for hearing on the motion of the defendant for a new trial, was argued by counsel and submitted to the Court.

23 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Opinion on Motion for a New Trial.

This case was tried during the present term of court under the new Federal Employers' Liability Act, resulting in a verdict for the plaintiff, administrator of the estate of Wisemiller, for the benefit of the next of kin, for $12,000.00, and is now before the court on a motion for a new trial, raising some questions presented to and determined by the court during the progress of the trial, with which determination the court is still satisfied, and, as further grounds, contending that the verdict is excessive and that the court erred in its charge to the jury in stating the measure of damages by including a proposition stated in this language, quoted from the charge:

"In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure as far as you can what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

There seems to be no direct authority from an appellate
24 court for or against the correctness of the proposition stated in the quotation above given from the charge as one of the elements of damage in behalf of a wife in an action for the death of her husband. In many cases, this element has been included for the benefit of children of a deceased parent, to the approval of a court of review, and in behalf of a wife it has been given to juries by trial courts.

In a case tried in this court, entitled Kountz, Administrator, vs. Toledo, St. Louis & Western Railway Company, a verdict of four thousand dollars was rendered, and there the decedent was sixty-six years old, earning but three hundred dollars per year, and, had he lived the full expectation of his life, he would have received in wages but a little over three thousand dollars. In this case, the direct pecuniary loss to the family resulting from the deprivation of decedent's earnings alone could not have reached the sum of two thousand dollars, or one-half the amount of the verdict, computed upon his expectancy of life. The jury did not receive an instruction such as quoted from the case at bar, but, in passing upon the motion for a new trial Judge Tayler used this language:

"I take this opportunity of stating that, in a death case, I do not think such a sharp definition as counsel give to it can be made of the limitations within which a jury may rightly go in determining the damage that is sustained by one who is in such close relation to the dead man as the widow in this case. I do not mean close relation in the sense that damages ought to be given for feelings that are hurt; but because of the relations that exist between persons so circumstanced there is a pecuniary loss growing out of the destruction of the life of one upon whom another is measurably dependent that is not wholly determined by the money which the dead person earns. The value of the attention and of the care which a wife gives a husband or a husband gives a wife is pecuniary in the last analysis, and is a thing that can be recovered for. We distinguish it from the suffering which the one who is left endures and for which there is no right of recovery."

25 The judgement was sustained by the Circuit Court of Appeals.

In the case at bar, in addition to the instructions given to the jury of which quotation has been made, the court very emphatically instructed the jury that they might not award damages by way of a balm to the widow's feelings or upon the assumption that she suffered anguish and sorrow as a result of her loss, that considerations of this sort should be dropped out of the case absolutely.

In the absence of any authority which appears to the court at all controlling, we are content with the charge in this particular, and believe that the element of damage involved in it is a proper one to be left with the jury in a case of this kind, as being as susceptible of measurement in money as other elements of pecuniary damage which are well established, and that it is well within the language of the statute, in the expression that the action lies "for such injury or death resulting in whole or in part" from the fault attributable by the statute to the company.

The remaining ground for a new trial has given the court some consideration only because the award of damages exceeded the Court's expectation of what the jury would do under the circumstances. The facts were as follows: The decedent, Wisemiller, was an engineer of twelve years' career in that capacity, under the employment of this company: of the age of forty-five years; receiving from $125.00 to $175.00 per month, according to the mileage made by him; accustomed to take fifteen or twenty days' vacation each year, otherwise to remain in continuous employment. At the time of his death he had an exceptancy of life of a little less than twenty-five years. He had no children, and apparently lived happily with his wife, the beneficiary in this case, who was thirty-eight years old.

26 The undisputed evidence showed that he brought his pay checks to his wife, who, as the testimony in the cross-examination disclosed, had the control and disposition of their proceeds and the spending of the money; that she paid the bills and deposited what was over their personal expenses, and that their savings amounted to fifty dollars per month.

The evidence touching the direct financial interest the wife had in her husband's earnings, in the court's judgment, justifies the verdict, especially when there is taken into consideration their very close relations and the probability that she would be his sole heir.

In fact, to assume that her fair share of her husband's earnings, under the circumstances of this family, was seven hundred dollars per year, representing her support and what was a fair division to her of the surplus, it would take almost the amount of the verdict to buy an annuity for her in that amount at either five or six per cent for the period of his expectancy, or twenty-five years.

The court finds itself bound by the rule that the verdict cannot be set aside in the belief that it was excessive unless the amount of it so very greatly differs from what the court's idea is of a just award as to convince the court that the jury acted in passion or prejudice. Nothing in this record suggests that the jury disregarded the court's explicit admonition to adjudge the rights of the parties calmly and dispassionately; and, in fact, the amount of the award measures so closely to what might be said to be proper, having regard only to his earning capacity, that one might almost say that the jury had not given any consideration to that portion of the court's charge wherein they were given leave to include as a measure of damages their estimation of the value of the care and advice of the husband to the wife.

The motion for a new trial is overruled, with exceptions.

December 2, 1910.

(Signed) JOHN M. KILLITS,
Trial Judge.

27 (Endorsement:) No. 2187. United States Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Adm'r of Albert Wisemiller, Deceased, Plaintiff, vs. Michigan Central Railroad Company, Defendant. Opinion on motion for a new trial. Filed Dec. 3, 1910. B. C. Miller, Clerk U. S. Circuit Court, N. D. O.

June Term, A. D. 1910, to-wit, December 5, 1910.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Journal Entry Overruling Motion for a New Trial.

This 5th day of December, 1910, came the parties by their respective attorneys and thereupon this cause came on for hearing and was heard upon the motion of the defendant for a new trial in this action, for the reasons set forth in its said written motion and the Court on

consideration has overruled the same, to which action of the Court the defendant now here excepts.

Upon the application of the defendant it is given 30 days from this 5th day of December, 1910, within which to prepare, have allowed and file its bill of exceptions herein.

28 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that, on the trial of the above entitled case, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, at the June, 1910, term thereof, before the Honorable John M. Killits, and a jury duly impanneled and sworn, the following proceedings were had:

Appearances:

C. A. Thatcher, Esq., for the Plaintiff.
E. D. Potter and F. E. Robson, Esqrs., for the Defendant.

29 Counsel for the respective parties stated the case to the court and jury.

Mr. THATCHER: If the court please, and counsel on the other side, perhaps we can expedite matters by an agreed statement of one or two things. The answer discloses the fact that the northbound train was engaged in interstate commerce. I want to inquire whether it is admitted that the southbound train was also engaged in interstate commerce?

Mr. POTTER: It is admitted that both the northbound and the southbound and their employés were engaged in interstate commerce at the time of this accident.

Mr. THATCHER: The answer does not specifically deny the appointment of the administrator. I expect it is not necessary to be specific.

The COURT: The record may show his qualification.

Mr. POTTER: We cannot except that. He will have to make proof of that.

The COURT: You say you require proof of that?

Mr. POTTER: Yes, we require proof of that, if Your Honor please. The reason why we do not want to admit it is, we do not want to be precluded in some objection we may make to it in some legal aspect of the case.

The COURT: Do you admit it, subject to that qualification?

30 Mr. POTTER: Reserving our right to make objection. We will admit that he was appointed by the court, but reserving the right to make any objection hereafter to the validity of it or the effect of it.

Mr. THATCHER: Is it admitted that the plaintiff herein is a resident of Lucas County, Ohio?

Mr. POTTER: I do not know anything about that, Your Honor.

Mr. THATCHER: Is it admitted that Mr. Wisemiller's train was a regular train and the other train which collided with it was an extra train?

Mr. POTTER: There is no doubt about that.

The COURT: That is admitted.

Mr. POTTER: It is admitted that the northbound train was a regular train and the southbound train was an extra.

Mr. THATCHER: Is it conceded that the book of rules which I show you, in force April 1, 1906, was in force at the time of this accident?

Mr. POTTER: We will admit, if Your Honor please, that in 1906 this was a copy of the printed rules of the Michigan Central Railroad Company. I do not know of any modification of it.

The COURT: It is admitted that the book marked "Plaintiff's Exhibit A" contains the rules——

31 Mr. POTTER: Rules for the government of the transportation department of the Michigan Central Railroad Company in force in——

Mr. THATCHER: The point is—Were they in force at the time of this accident? That is all we care about.

Mr. POTTER: If there are any modifications, we can show that.

The COURT: Reserving the right to show such modifications as may have been the fact.

Mr. POTTER: With any modifications that we reserve the right to show.

Thereupon the plaintiff, to maintain the issues on his part, called as a witness in his behalf, D. S. SUTHERLAND, who, being first duly sworn, testified as follows:

Direct examination by Mr. THATCHER:

Q. Mr. Sutherland, state your business?

A. Division Superintendent of the Michigan Central Railroad.

Q. What Division are you Superintendent of?

A. The Eastern Division of the Main line, the Bay City Division and the Detroit Division.

Q. On what Division was Albert Wisemiller employed at the time of his death, as an engineer?

A. On the Bay City Division.

Q. Will you please produce the train orders under which he and southbound extra 215 were working on October 5, 1909?

A. Produce copies of them?

Q. Yes; that is satisfactory. Will you do so now, please? Or you just read them, please, to the stenographer, if you will.

(Witness produces papers.)

32 Q. Suppose you give first the train order to Wisemiller's train?

A. The orders were sent——

Mr. ROBSON: May those be numbered before the witness reads them? It will be easier to refer to them afterwards.

Mr. POTTER: Let him mark the one which he is reading "Exhibit 2."

Mr. THATCHER: I am not offering this entire book of rules in evidence. I will only introduce certain of them.

The COURT: That may be noted.

Mr. THATCHER: That may be No. 1.

The COURT: These may be designated orders 1, 2 and 3, may they not?

Mr. ROBSON: That is all right.

(Orders so marked by the witness.)

A. Order No. 1 reads: "Engine 8101. Eight one nought one runs extra Denmark Junction to Oxford freight house. Meets extra 7739, seven seven three nine, at Vassar. Northbound extra gets this order at Vassar."

Order No. 2 reads: "Extra 8101, eight one nought one, meets No. 215, two fifteen at Carpenter, instead of Lapeer."

Order No. 3 reads: "Nos. 215 two fifteen and 217 two seventeen meet extra 8101 eight one nought one at Lapeer."

Q. Are those all that you have?

A. Yes, sir.

Mr. POTTER: Let me understand. No. 2 was superseded by No. 3?

The WITNESS: No. 2 superseded No. 3—changed the meeting.

Mr. POTTER: How is that?

The WITNESS: No. 2 changed the meeting. No. 3 simply came in ahead of No. 2.

33 Q. The only order then that these two trains were governed by at the time of the accident was what you have read as No. 2 there, isn't it?

A. Yes, sir.

Q. Now, Mr. Wisemiller was the engineer, I believe, on 8101, the northbound train?

A. No, sir. Mr. Wisemiller was the engineer on the regular train, No. 215, the northbound train.

Q. Yes. I have got the numbers wrong. Regular, 215?

A. Yes, sir.

Q. Then in carrying out these orders, when he reached Carpenter, where would it be his duty to stop his train?

A. Before passing the north switch.

Q. And stop on the track?

A. Either the side track or the main track.

Q. His being a regular train, what is the fact as to its being entitled to possession of the main track?

A. He was entitled to the main track on account of being a regular train.

Q. Extra 8101 was the southbound train, was it?
A. Yes, sir.
Q. What, under the rules and regulations of your company, was it the duty of those in charge of the southbound train to do?
A. To stop, and, if the main track was occupied, pull into the side track.
Q. And where was the switch leading to that side track which the south bound train should have taken?
A. North of where train 215 stood.
Q. Then, if I understand it, it was Wisemiller's duty to stop his train south of this switch, and for the southbound extra to enter that switch and take the siding, so that Wisemiller's train could proceed northward?
34 A. Yes, sir.
Q. State, if you know, how much Mr. Wisemiller was earning on the average per month?
A. I could not say.
Q. How are they paid for their services?
A. They are paid by trips or miles run, actual service performed.
Q. And what did engineers receive?
A. I could not give you the exact figures. They are paid through the locomotive department.
Q. Did you go to the scene of this wreck after it occurred?
A. Personally? No, sir.
Q. You may state whether, at the time of this accident, Rule 86-*a*, which reads: "An inferior train must keep out of the way of a superior train," was in force?
A. Yes, sir.
Q. Did that mean then that the southbound extra 8101 should keep out of the way of Wisemiller's train?
A. Unless it had special orders to the contrary.
Q. But under the circumstances of this case, where these orders were given, what was it the duty of this southbound train to do?
A. To stop at the switch and pull into the sidetrack.
Q. And keep out of the way of Wisemiller's train?
A. That is, pull by Wisemiller's train.
Q. Under this order, was it their duty to keep out of the way?
A. He had a train order that preceded that. He had a train order giving him a right to go to Carpenter to meet Wisemiller's train.
Q. He was to take the siding under that train order—is that right?
A. Yes; if Wisemiller was on the main track.
35 Q. Which is that train order here, please? Is that one of these?
A. Train order No. 3; 2 and 3 are alike; one makes them meet at Lapeer, if I remember rightly, and the other one changes the meeting to Carpenter. That gave him a right to go to those points for that train, in either case.
The COURT: Is Lapeer north or south of Carpenter?
The WITNESS: Lapeer is south of Carpenter. He was not going that far.

Q. Was Rule 88 in force, which provided: "At meeting points between trains of the same class, the inferior train must clear the main track before the leaving time of the superior train"?

A. It would be in force, but it can be superseded by train orders, which it was in this case.

Cross-examination by Mr. POTTER:

Q. As I understand, Mr. Sutherland, the train orders direct the two trains to meet first at Lapeer?

A. Yes, sir.

Q. And by reason of conditions that was changed so that the two trains were to meet at Carpenter, is that right?

A. Yes, sir.

Q. Where a northbound train is to meet another train that has, we will say, the right of way on the main track, say at a place like Carpenter, and he has a right to come in on the main track, what reasonable distance should he stop upon the main track south of the switch that is to be taken by the southbound train, in order to prevent injury or accident?

A. He should stop far enough south to permit of the other train pulling into the side track clear.

Q. But if by reason of any incident the north end of the
36 switch should happen to be closed, what usual distance does the person—we will say the northbound train—stop to let another train in on the switch? What distance would he stop south of the switch in order to prevent an accident in case the switch should not be open?

A. Far enough——

Mr. THATCHER: I think he ought to be able to answer—he is the superintendent—without suggestion. And I object to the question on the ground that it is not proper cross-examination; it is apparently intended to be defensive, and if so, they must wait until they reach their defense.

The COURT: I think this is proper cross-examination on the range of the direct examination.

(Exception by plaintiff.)

A. He should stop so as to clear the side track for the pulling in of the other train. I should judge that would be a distance of about—something over two hundred, or two hundred and twenty-five feet, from the switch.

Q. Should he stop near enough to the north end of the switch so as to enable the persons in charge of the northbound train to reach the switch in time to throw it for an approaching train going south?

(Same objection; overruled; exception by plaintiff.)

A. The train would stop far enough from the switch so that the other train in obeying their order in stopping for the switch, setting it up, could pull in on the side track.

Q. It is the duty of the train first arriving there to throw the switch, isn't it, to let the southbound train in?

A. Yes, sir.

Q. Suppose the northbound train got there first and came
37 to a stop, whose duty would it be—what trainman's duty would it be—to throw that switch for the southbound train?

A. If they were on the main track and stopped and waiting, it would be their duty—one of the men of that train—to go ahead and set the switches for the approaching train.

Q. And the northbound train should stop at a distance then say of two hundred feet of the switch?

A. Of where the northbound train stops, yes, sir. So that if the switch was not set, they would stop and set up the switch. They have no right to go by that switch until they know it is set proper for them and where the other train is located.

Q. You are entirely familiar with the location and situation of the track there at Carpenter?

A. Yes, sir.

Q. Take a northbound train stopping say one hundred and fifty or two hundred feet south of the north switch, how far could he see a train coming from the north, ordinarily—the engineer, we will say?

A. I don't know as I could answer that question.

Q. Can you tell us about how far?

A. I can't; I ain't enough posted with the view there to answer that question.

Q. How is the grade there, if you know? Do you remember that?

A. Not without looking at the profiles I couldn't say.

Redirect examination by Mr. THATCHER:

Q. If I understand you, Mr. Sutherland, you do not know anything about the angles of these tracks where this switch was at Carpenter at the time of the accident and how close the clearance point is. Do you know any thing about it personally?

38 A. I know it is the regulation distance of switches. From the switch it leads in on the side track until it clears the other track and space enough so that an obstruction on the other track cannot "track"—that would be clear.

Q. There was no trouble of that kind in this instance—Mr. Wisemiller left clearance enough?

A. He was standing in proper distance from the switch to allow the other train to have taken the side track.

Q. Even if he saw another train coming from the north, he would have a right to rely upon that other train stopping before it reached the switch, under your rules and practice, would he not?

A. If he had been in time he should have seen, being the man in charge of the head end of the train, that one of his men was sent up there to set up that switch; that was a part of his duty.

Q. If he did not have time he could not do it and you would not expect him to, would you?

A. No.

Q. If he had seen a train coming from the north—a headlight—wouldn't he, under your rules and practice, have had a right to rely on that train stopping before it got to the switch, when they had orders to take that switch?

A. No, sir. It was his duty and the duty of that train when they stopped there to immediately make arrangements to go ahead and set that switch for the southbound train.

Q. Do you, as Division Superintendent of that road, say that southbound train would have had a right to run by that switch, even if it was not open?

A. No, sir.

Q. They did, didn't they? Now, my question is, wasn't it the duty of the southbound train to stop before it reached that switch-stand, whether it was open or closed?

39 A. Yes, sir.

Q. And Wisemiller knew that, didn't he, or was expected to know it, as one of your engineers?

A. Wisemiller knew what his duties were——

Q. I am not talking about that. Wisemiller had a book of rules, didn't he, which stated that fact, that that southbound train should stop?

A. Yes, Sir.

Q. You don't know whether Wisemiller had time to send a man ahead or not, do you?

A. I don't know personally.

Q. You do know as a fact that he did send a man ahead and that he did not have time to get there?

A. I don't personally know that; no, sir.

Q. Your records show that, don't they?—the report of this accident?

(Objection by defendant; sustained.)

Recross-examination by Mr. POTTER:

Q. When you say that Wisemiller stopped the proper distance from the switch, what distance did you understand that he stopped from the switch when you made the statement?

A. I couldn't give you that in exact feet, Mr. Potter. It is a distance of in the neighborhood of 200 or 220 feet.

Q. What would you say as to a distance of 500 or 600 feet—if he stopped 500 or 600 feet from the switch—whether that was a proper distance to stop in order to give his man time to go up and throw that switch for the southbound train?

A. He had a right to stop any distance back of that switch, but he had no right to go beyond what is called the fouling point of the other track.

40 Q. What do you say as to 500 or 600 feet, if he stopped on the track 500 or 600 feet south of the switch?

Mr. THATCHER: I object to his opinion? He has already stated that he had a right to stop at any point as long as he did not foul

the switch. It is not for him to express an opinion whether 500 or any other feet is proper—he says "any distance"—and I object.

Mr. POTTER: He might have had a right to stop at any point, but under the conditions and under his orders what we claim is that he had no right to stop at such a distance south of the north switch as to preclude him from throwing the north switch in time to let the train in.

The COURT: I understand that, but can this witness decide the question for you? I think the objection should be sustained.

Thereupon the plaintiff, further to maintain the issues upon his part, called as a witness in his behalf, ELMER J. BIRDSELL, who, being first duly sworn, testified as follows:

Direct examination by Mr. THATCHER:

Q. Give your name to the jury?
A. Elmer J. Birdsell.
Q. What is your business?
A. Fireman for the Michigan Central Railroad.
Q. Fireman for what road?
A. Michigan Central.
41 Q. Where do you live?
A. Detroit.
Q. Were you the fireman on the train the day that Mr. Wisemiller was killed at Carpenter?
A. I was.
Q. Northbound No. 215, was that it?
A. Northbound No. 215.
Q. Did that train come to a stop before this collision?
A. It did.
Q. And what was done immediately on its coming to a stop as to sending a brakeman out; what was done?
A. The brakeman was on the ground.
Q. What did he do?
A. I don't know?
Q. Did you see him on the ground?
A. I did not.
Q. What were you doing?
A. On my side of the box in the cab.
Q. How long had the train stopped there before the collision occurred?
A. Not more than two or three minutes.
Q. Do you mean minutes?
A. Minutes.
Q. What?
A. Minutes.
Q. It had stopped? It had actually come to a stop?
A. It had.
Q. How long did you say it was before the collision occurred?
A. Two or three minutes.

Q. Mr. Birdsell, will you see if that is your handwriting? (Handing witness paper.)

42 A. That?

Q. Yes.

A. Yes, sir.

Mr. THATCHER: I will say to Your Honor that I am surprised by the answer of the witness.

Q. I will ask you if you did not, at Detroit, Michigan, January 29, 1910, sign this statement (referring to the paper shown the witness), in which you said: "Our train had barely come to a stop when I saw Wisemiller reverse the engine, could tell the wheels were sliding under the engine, and then crash at once came as southbound train struck us"?

Mr. POTTER: I object to the question.

Q. Now, did you not make a statement——

The COURT: There is an objection to the question in this form. The objection is sustained.

Gentlemen of the jury, kindly disregard what you have heard concerning the contents of this statement. Counsel will be careful not to indirectly get incompetent matter to the jury.

Mr. THATCHER: I am not going to do that, and I wish to say to Your Honor that when I have been taken by surprise in this court, with Judge Tayler sitting I have repeatedly called the attention of the witness——

The COURT: There is no question of your right to do that.

Q. Did you have a conversation with me at Detroit on January 29, 1910, on the subject of this accident?

A. I did.

Q. For the purpose of refreshing your recollection, I will ask you if you did not tell me at that time that your train had barely come to a stop when you saw Wisemiller reverse the engine?

43 (Objection by defendant; overruled; exception.)

Q. And did you not tell me that you could tell the wheels were slipping under the engine and then the crash came at once as the southbound train struck your train?

A. Two minutes is not very long, is it?

Q. Answer the question. Did you tell me that?

A. I did.

Q. Was that true what you said then?

(Objection by defendant; sustained; exception by plaintiff and offer to show that it was.)

Q. What is the fact, without going into minutes or seconds, had your train just barely stopped and been reversed when this crash came?

A. We had stopped long enough for the brakeman to get down off the engine.

Q. Answer *by* question. Had your train just barely stopped and Wisemiller reversed it when the crash came?

A. Why, we was there two minutes.

Q. Who said anything to you about two minutes?

A JUROR: What is that answer?

THE COURT: He said, "We were there two minutes".

Q. Now, I want to ask you another question. I don't want anything about two minutes. You are not answering the question. Had your train just barely come to a stop and did Wisemiller immediately reverse it after it had come to a stop and did the crash immediately come, without giving any minutes; is that true?

A. After we had made out stop he reversed his engine.

Q. Did he reverse it at once?

A. Not immediately.

Q. Did you not say to me as you have just confessed or admitted that he did immediately reverse it? Did you say that?

44 A. He did not immediately reverse his engine.

Q. Did the crash come immediately after you had stopped there?

A. After he reversed his engine, it did.

Q. Had he started to back up his engine?

A. He had.

Q. Now, what is the fact—had your engine barely come to a stop when you saw Wisemiller reverse the engine?

A. Our train had come to a stop.

Q. It had barely come to a stop?

THE COURT: Had it stopped for any appreciable length of time when he reversed his engine?

THE WITNESS: Yes, sir.

Q. Had it barely come to a stop? That is what I want to know?

A. Yes; it come to a full stop.

Q. Did he at once then reverse his engine? Had you got off your seat on the box?

A. I had not.

Q. Was he on his side of the box?

A. Near his side of the box.

Q. Did he have hold of the lever of the engine?

A. Yes, sir.

Q. Did you tell me in Detroit, on January 29, 1910, and sign a written statement to the effect "That we were struck within a few seconds after we stopped at Carpenter"? Did you say that?

A. A few seconds?

Q. Yes. (Shows paper to the witness.)

A. That is what it says.

Q. Is that true?

MR. POTTER: Is what true?

Q. Is it true that you were struck within a few seconds after you stopped at Carpenter?

(Objection by defendant; sustained; exception by plaintiff and offer to prove that it is.)

45 Q. Did you tell me at the time you signed this written statement that you were struck within a few seconds after you had stopped at Carpenter?

A. That is what that says.

Q. Did you make that statement at that time, last January?

A. That is what I told you.

Q. Is that correct?

A. More than a few seconds.

Q. Who have you been talking to regarding this matter, Mr. Birdsell, on behalf of this company, *of* any one?

(Objection by defendant on the ground that it is immaterial; sustained; exceptions and offer to show that he has been talking with the agents and attorneys of this company.)

Q. Did you see the southbound train before it struck you?

A. I did not.

Q. What was in the way of your seeing it, if anything?

A. Around the curve.

Q. How fast was your train moving when it came to about a stop or a stop there?

Mr. POTTER: What train have you reference to—the northbound train?

Mr. THATCHER: Yes.

Q. Just before your stopping, did you gradually come to a stop or was it a sudden stop?

A. Gradual stop.

Q. How far from the north switch did you stop?

A. Three or four hundred feet, something like that. May be more. I don't just know.

Mr. POTTER: You say between three and four hundred, or four hundred?

46 The WITNESS: Three or four hundred.

Q. Now, you may describe to the jury what occurred when this collision took place?

Mr. POTTER: There is no doubt a collision took place. There is no doubt but what this man was injured, and to describe all that took place——

Mr. THATCHER: I do not mean that.

Q. What happened to your engine and to the other engine there? Describe the position of Wisemiller?

A. The position of Wisemiller?

Q. Yes.

A. He was lying on the ground when we found him.

Q. What happened to those two engines and the cars?

A. Why, they were piled up.

Q. And engines crushed, were they?

A. Yes, sir.

Q. Broken?
A. The front end.
Q. Was Mr. Wisemiller living or how when you found him lying there?
A. Yes, sir.
Q. How long did he live after that?
A. About three hours.
Mr. POTTER: How long?
The WITNESS: About three hours.
Q. Where was the engine when the front brakeman got off of the engine?
A. Where was the engine when he got off?
Q. Yes.

Mr. POTTER: What do you mean by that?

47 Q. While it was on the main track?
A. On the main track?
Q. Before it had about stopped, when he got off—or did he get off before that?
A. We come to a full stop.
Q. Before he got off?
A. Yes, sir.
Q. Did he take his lantern with him when he got off?
A. He did.
Q. Do you know what his purpose in getting off was?
A. I do not.
Q. What was it his duty to do under the circumstances?

(Objection by defendant; sustained.)

Q. You may state, if you know, what the duty of the front brakeman was on those trains?

The COURT: Doesn't it show in the rules?
Mr. THATCHER: We haven't anything in the rules on the subject. I think the superintendent did speak about the duty of the front brakeman.

Q. Do you know what the duties of the front brakeman are on those trains in regard to the opening of switches or flagging?
A. I do.
Q. What was the duty of your front brakeman?
A. What was his duty?
Q. Yes, if any.

Mr. POTTER: Does he say that he knows what the duty of the front brakeman was?
The COURT: He said he did.
Mr. THATCHER: The fireman ought to know. That is where the front brakeman rides.

48 Q. Tell what his duty was? Was it to go ahead and open the switch for the other train, if he had time?
A. If he had time; yes, sir.

Cross-examination by Mr. POTTER:

Q. What time did this accident happen, Mr. Birdsell?

The COURT: Let us first find if he has any means of knowing.

Q. If he knows about what time. It may not be possible to have the exact minute or second, but about what time, as near as you can give it, did this accident happen?

A. About four o'clock.

Q. In the morning or in the afternoon?

A. In the morning.

Q. You were fireman on Mr. Wisemiller's train?

A. I was.

Q. Did you jump from the engine as you saw the train coming?

A. I did not see the train coming.

Q. Then you were on the engine at the time of the crash or collission, were you?

A. I was.

Q. You did not know the train was coming until the two engines collided?

A. I did not.

Q. Then where were you when they came together? What were you doing?

A. On my seat box.

Q. How far could you see, if you had been looking out, how far ahead could you see that train coming from the place where you were—you can put it in rods or division of miles—how far could you see the headlight of that train from where you were, had you been looking at it?

49 A. On my side of the engine, you mean?

Q. On either side of the engine, the engineer's side or your side—quarter of a mile, half a mile or what?

A. Quarter of a mile, from the engineer's side.

Q. You say there is a curve. Which way did it curve? For instance, this is north, we will say, here (indicating), and you are going north, did the curve run off toward the east or did the curve run off toward the west? You understand me?

A. I was on the outside of the curve.

Q. Your place would be in the left hand side of the engine?

The COURT: The curve ran to the east, did it?

The WITNESS: Yes, sir.

Q. Your position or place was on the left hand side of the engine, I take it?

A. Yes, sir.

Q. And that of Mr. Wisemiller was on the right hand side?

A. Yes, sir.

Q. So that he had a better opportunity of seeing the approach of that train than you had?

A. He did.

Q. Because you were on the outside of the curve and he was on the inside of the curve and the curve being toward the east, and

you say that in your judgment on the engineer's side of the train you could see that train coming a quarter of a mile away?

A. A quarter of a mile.

Q. You say that when you first found Mr. Wisemiller he was lying on the ground, how far from his engine?

A. How far from his engine?

Q. Yes.

A. Ten or twelve feet.

Q. Was he on the right hand side of the engine or what
50 would be the left hand side?

A. On the right hand side.

Q. That is on the engineer's side?

A. On the engineer's side.

Q. About how many feet would you say?

A. Ten or twelve.

Q. Were you the first one that got to him?

A. One of the first ones.

Q. How long after the crash did you get to him?

A. Ten or fifteen minutes.

Q. Was there anybody there when you got there?

A. The train crew.

Q. Who were these parties that were there ten or fifteen minutes after the accident? Just name them, if you please?

A. Mr. Ross.

Q. Who else?

A. Mr. Timmerman.

Q. Anybody else that you remember?

A. I do not remember anybody else.

Q. Did you, when you got to him, have any conversation with Wisemiller? Did you have any talk with him or conversation with him?

A. I did.

Q. Can you tell the jury the substance of the conversation, what you talked about, what was said by him or by you or by the others?

A. The first thing he asked was for his wife, the first thing, and he told me to take his watch and his pocket book.

Q. Did he hand them to you?

A. I took them out of his pocket.

51 Q. What inquiry, if any, did he make? Just tell us as you remember the conversation at that time that took place between you and him or that you overheard?

A. I cannot remember.

Q. How?

A. I can remember nothing else.

Q. Did he appear at that time to be conscious, in a conscious mental condition?

A. He was.

Q. And he lived some three hours after it occurred. When did he die, if you remember the hour, or about what hour?

A. He died at Lapeer.

Q. Whereabouts?

A. In the hotel.

Q. Were you present at the time of his death?

A. No.

Q. How long were you with him after the injury? Just go on and tell the jury what you did after the injury, whether you took him any place, or were you there with him, and whether you went with him?

A. We took him to the hotel and he was treated by physicians there.

Q. Did you go with him from the place of the injury, accompany him to Lapeer?

A. I did.

Q. Was he put into a car and taken away?

A. He was.

Q. What was the head brakeman's name on the train?

A. Kearsley.

Q. Did you see him when he got off the train?

A. I saw him when he got off the engine.

52 Q. He was on the engine, was he?

A. No; I saw him when he got off of the engine.

Q. Did he come down into the engine after your train came to a stop?

A. No.

Q. Where was he when your train came to a stop, if you remember?

A. After it was stopped he was on the ground.

Q. After your train came to a stop, where was your head brakeman?

A. On the ground.

The COURT: Where was he riding just as the train came to a stop?

The WITNESS: On the engine.

Q. Then he was on the engine when the train came to a stop?

A. He was.

Q. Did he get off the engine before the train came to a stop or after it came to a stop?

A. After.

Q. After the train came to a stop. Did anybody order him to get off the engine?

A. No.

Q. You understood it to be the engineer's duty to direct him to go up and open the switch?

Mr. THATCHER: I object to what he understood.

They have rules on the subject.

The COURT: An inquiry of this character was permitted by you a short time ago.

Mr. THATCHER: He may state what his duty was and whether he performed it.

Mr. POTTER: I do not know whether it was the engineer's duty to direct the brakeman to get off and throw the switch.

53 Q. Is that the engineer's duty, as you understand it?
A. It is the engineer's duty.
Q. You simply saw that he got off the engine and that is all?
A. Yes, sir.
Q. You did not see how far he went?
A. I did not.
Q. How far he went before the accident. This happened about 4 o'clock in the morning of—what was the date?
A. October 5th.
Q. October 5th, about 4 o'clock in the morning?
A. Yes, sir.
Q. And there was nothing the matter with your engine, so far as you knew, was there?
A. Nothing.
Q. How large a train did you have, how many cars did you have?
A. I can't just tell you that.
Q. Do you remember about how many you had?
A. About twenty-five.
Q. Were they loaded cars or some loaded and some empty?
A. Some of them, yes, sir.
Q. How was the track there? Was it about on and even grade or was it down grade or up grade, which way, do you know?
A. It was up grade.
Q. Up grade going north?
A. Up grade going north.
Q. So that the train, then, as it rested on the main track, it really rested on what would be called a down grade, is that right?
A. Yes, sir.
Q. Was it on any part of the curve or was it on the straight track?
54 A. On the curve.

Redirect examination by Mr. THATCHER:

Q. You said something about the duty of an engineer to order the front brakeman out. A front brakeman who understands his business goes out to do those things without orders, don't he?

(Objection by defendant; overruled; exception.)

A. What is your question?
(Question read.)
A. He does.
Q. And, if he don't do it, then it is the duty of the engineer to tell him to go, is that right?
A. That is right.
Q. And this man in fact did go out, didn't he—this front brakeman—with his lantern?
A. Yes, sir.
Q. Now, you spoke about being with Mr. Wisemiller for two or three hours after the accident. Was he suffering much or not?
A. No.
Q. Did he seem to be in any pain?

Mr. POTTER: The question is, whether he appeared to be suffering.

The COURT: How did he appear in that behalf, whether he was suffering or not?

The WITNESS: Yes, sir; he was suffering to an extent.

The COURT: He appeared to be suffering, did he?

The WITNESS: Yes, sir.

Q. Did you stay with him continuously?

A. I did.

Q. Was he talking during that time?

A. He was.

55 Mr. POTTER: If your Honor please, we desire to save an exception to this testimony.

The COURT: Did you not open it yourself, Mr. Potter?

Mr. POTTER: No. The question as put by Mr. Thatcher was as to how long he lived, how long he survived the accident, and he said some three hours, and of course I asked him if during that time he was conscious and he said he was. That is as far as I went, that he appeared to be conscious, but whether he appeared to be suffering——

Mr. THATCHER: I have no objection to the jury being instructed they should not consider that in measuring the damages, but I do not know the purpose of going into this by Mr. Potter at all.

If it is for the purpose of making admissions, I have a right to go into his state of mind.

The COURT: That will come at some other stage of the trial, I suppose, if that matter is opened up at all.

Q. Were any anæsthetics administered to him, or opiates, by the physicians or anybody?

A. I don't know.

Thereupon the plaintiff, further to maintain the issues upon his part, called as a witness in his behalf, EDWARD J. KEARSLEY, who, being first duly sworn, testified as follows:

Direct examination by Mr. THATCHER:

Q. What was your position on Wisemiller's train?

A. The head brakeman.

Q. Are you still working for the company?

A. No, sir.

Q. Where do you reside now?

A. 1199 Russell Street, Detroit.

56 Q. Now what did you do as your train approached or nearly stopped at Carpenter on the night of this accident?

A. Mr. Wisemiller told me to run ahead and open the switch.

Q. What did you do?

A. I got down and started on a run for the switch.

Q. Were you able to reach it?

A. No, sir; I was not.

Q. Why not?

A. Because the southbound approaching train got there before I did.

Q. Go on and describe what occurred?

A. I got about half the distance from our engine to the switch——

Mr. POTTER: How much is that?

The WITNESS: Well, I should judge about seven car lengths.

The COURT: You got seven car lengths or the distance was seven car lengths?

The WITNESS: The distance that I had got.

The COURT: That was about seven car lengths?

The WITNESS: Yes, sir.

Q. Go on and describe what occurred?

A. I swung him up—I had a lantern—I swung him up from the right hand side and then I crossed the track.

Q. Swung who?

A. The southbound engine, 8101.

Q. What were your signals, what was the nature of those signals?

A. Swing a lantern across the track.

Q. What did that mean?

A. Stop.

57 Q. Did he stop?

A. No, sir; he did not.

Q. What did he do?

A. He kept right on coming.

Q. What occurred?

A. They collided together.

Q. Struck your engine?

A. Yes, sir.

Q. Now describe the conditions immediately after the collision, and where, if at all, you saw Wisemiller?

A. Nothing, only that the engines were bound together, and Mr. Wisemiller, I found him on the right side of the engine, I should judge about twelve feet, twelve or fourteen feet, from his engine.

Q. Describe any injuries you found on his person?

A. I believe his left arm was mashed from his elbow down. Of course that is all that I could see.

Q. Did you see him after he was stripped, see his body?

A. No, sir; I did not.

Q. You had a lantern with you, I believe you have stated?

A. Yes, sir.

Cross-examination by Mr. POTTER:

Q. You say you got off of the engine on the order of the engineer, Wisemiller?

A. Yes, sir.

Q. Your train had come then to a full stop?

A. Just about; yes, sir.

Q. And he told you, directed you, to run forward and open that switch and let the south bound train come in?

A. Yes, sir.

Q. His orders indicated to him that he was to meet that
58 train at that switch at that point?
A. Yes, sir.
Q. And you ran, after you got off the engine, some seven car lengths?
A. About seven car lengths.
Q. Which you considered about half way to the switch?
A. Yes, sir.
Q. About what is the length of a car?
A. I believe on a general run it is 35 and 40 feet.
Q. Somewhere around between along about 34 or 35 feet.
A. Yes, sir.
Q. You judged that to be about half way between where the train came to a stop and the end of the switch that the south bound train was to take?
A. Yes, sir.
Q. When you got off your own engine, did you see this train coming?
A. The minute I got down on the ground I could see them coming.
Q. The minute you got down on the ground you could see them coming?
A. Yes, sir.
Q. Did you get off on the west side or the east side of the engine? I mean by that, whether you got off on the engineer's side of the fireman's side?
A. On the engineer's side.
Q. You got off on the inside of the curve, then, did you? Do you understand me?
A. Yes, sir.
Q. The moment you got off of your engine you saw the train coming?
A. Yes, sir.
59 Q. About how far would you say it was away when you first saw it?
A. Well, I should judge about a quarter of a mile.
Q. Could you see it plainly?
A. No, I could see the light, just the headlight.
Q. I mean, you could see the headlight.
A. Yes, sir.
Q. No difficulty in seeing the train was coming?
A. Yes, sir.
Q. And you understood it to be the train that you were to meet there?
A. Yes, sir.
Q. Now after the collision, you found Mr. Wisemiller on the right hand side of the engine a number of feet away?
A. About twelve or fourteen feet away.
Q. Did you go with him to Lapeer?
A. No, sir, I did not.
Q. How long were you with him?

A. Well, when I first arrived to him he asked for water to drink, and I believe the fireboy and I went together and got a pail of water, and then by that time the engine of No. 217 that was following us had arrived on the scene with a way car, and some of us and a few helping farmers, we got some cushions and laid him in the way car, and that was the last I seen of him.

Q. About how long were you with him?

A. I should judge about fifteen or twenty minutes.

Q. Was he conscious during that time?

A. Yes, sir.

Q. Seemed to know what was going on around him?

A. Yes, sir.

Redirect examination by Mr. THATCHER:

Q. When you started to run toward that train, did you go
60 as fast as you could?

A. Yes, sir.

Q. And, as compared with the speed that your train had been making, did you go faster than that was running just before it stopped or not?

Mr. POTTER: Wait a minute. I did not quite understand the question.

Mr. THATCHER: The point is, did he get there quicker than if they had taken the engine and tried to get there.

Mr. POTTER: He stated, if Your Honor please, that he ran as fast as he could and how far he ran.

Mr. THATCHER: I guess that is all.

(Noon adjournment.)

The witness recalled.

Mr. THATCHER:

Q. Mr. Kearsley, at the time you started with your lantern to go ahead for the purpose of opening that switch, had your engine come to a stop?

A. Just to a stop; yes, sir.

Q. Had it been standing any time at all?

A. No, sir; just as it was about to stop I stepped off.

Q. When you did that, had you and notice that that train would not stop at the switch, the southbound?

A. No, sir; I had not.

Mr. POTTER:

Q. The train, you say, had substantially come to a stop when you got off of the engine?

A. Just to a stop when I stepped off.

Q. And it remained, so far as you know, stationery until the collision?

A. Yes, sir.

61 Q. Did you see the engineer, Wisemiller, get off before the collision?

A. No, sir; I did not.

Thereupon the plaintiff, further to maintain the issues on his part, was himself, DANIEL B. VREELAND, called as a witness, and testified in his own behalf as follows:

Direct examination by Mr. THATCHER:

Q. Give your name to the jury?
A. Daniel B. Vreeland.
Q. What relation are you to Mrs. Wisemiller?
A. Brother; she is my sister.
Q. Where is your residence?
A. Toledo, Ohio, Lucas County.
Q. How long have you lived in Lucas County?
A. Five years.
Q. You are the administrator of this estate?
A. Yes, sir.

No cross-examination.

Thereupon the plaintiff, further to maintain the issues in his behalf, called as a witness on his part Mrs. LIBBIE WISEMILLER, who, being first duly sworn, testified as follows:

Direct examination by Mr. THATCHER:

62 Q. What is your name?
A. Mrs. Libbie Wisemiller.
Q. Are you the widow of Albert Wisemiller?
A. I am.
Q. And this action is being brought for the benefit of his estate by your brother, Mr. Vreeland? It is the same Wisemiller I want to identify that.
Mr. POTTER: There is no doubt about that; this lady is the widow of Wisemiller, the engineer who died.
Q. How long had you and Mr. Wisemiller been married prior to his death?
A. Eighteen years.
Q. What was his age at the time of his death?
A. Forty-five.
A. And how old are you?
A. Thirty-eight.
Q. What was he accustomed to do with his earnings while working for the railroad?
A. Usually for his and my support.
Q. Did he bring home the checks?
A. Yes, he brought the checks to me.
Q. Did you cash the checks for his pay?
A. Yes, sir, I did.
Q. What did his wages amount to a month?
A. $125.00 to $175.00.
Q. Varying as to how much overtime he may have put in, according to the mileage?
A. Yes, sir.

Q. What was his state of health at the time?
A. Good.
63 Q. How continuously was he employed? Was he regular about his employment?
A. He was regular.
Q. How long had he been an engineer?
A. I think twelve years.
Q. And before becoming an engineer what kind of work did he do?
A. Fireboy.
Q. And worked his way up to that?
A. Yes, sir.
Q. What means of support did you have except those furnished by your husband?
A. Not any.

(Objection by defendant on the ground that it is not competent; overruled; exception.)

Q. What were his habits as to sobriety and industry?
A. Good.

Cross-examination by Mr. POTTER:

Q. Mrs. Wisemiller, you say that he brought checks to you covering his monthly pay from time to time?
A. Yes, sir.
Q. Did you deposit the checks in bank or did you go and have it cashed, or what?
A. I went and had it cashed.
Q. Did you have control and disposition of the money, the spending of it?
A. I did.
Q. Can you tell the jury what proportion of those moneys were received or spent in his behalf or in your behalf or how it was spent?
64 A. For our living.
Q. Can you tell the jury or did you keep any account of what proportion went for his benefit and what proportion went for your benefit? Did you keep any account of it in that way?
A. I did.
Q. Then you are able to tell us. How did you keep it? In a book account?
A. I paid our bills and deposited what was over, put it away.
Q. Are you able to state to the jury what proportion of it went for his benefit and what proportion went for your benefit? How much did you save?
(Question withdrawn.)
Q. How much of his earnings did you have over and above what was necessary for your expenses and his expenses, about how much a month?
A. Well, it varied.
Q. How?

A. You mean how much I put away?
Q. Read the question. (Question read.)
A. Fifty dollars.
Q. How long had he been earning $125.00 to $175.00 a month?
A. The last four years.
Q. How many?
A. About four years.
Q. Now, the earnings over and above the $50.00 a month that you laid aside, what proportion of that was devoted to you? Are you able to tell the jury what proportion of that was devoted to your necessities and what to his? Did you keep any account of it or just simply spend it for general household expenses, your own
65 and his, and what was over that, what was left, was put in the bank; is that the way it was done?
A. Yes, sir.
Q. During the last four years that you speak of, Mrs. Wisemiller, did your husband lay off any time during the four years?
A. Yes, sir; he did.
Q. What was the occasion of it? Anything special—sickness?
A. No.
Q. What length of time did he lay off from time to time?
A. From ten to fifteen days.
Q. How frequently would that be?
A. Maybe perhaps two or three times a year.

Redirect examination by Mr. THATCHER:

Q. Mrs. Wisemiller, please tell, as near as you can, what Mr. Wisemiller's personal expenses amounted to each year; for instance, for clothing?
A. Perhaps $200.00.
Q. For the entire year?
Mr. POTTER: How much?
The WITNESS: $200.00.
Q. Do you mean for clothing alone or for all personal expenses?
A. Clothing alone.
Q. This sum that was laid aside each month, to whom did that go? Was it given to you or did he keep it or what?
A. Gave it to me.

(Motion by defendant to exclude answer; granted, and the jury instructed to disregard it.)

Q. What became of the money after it got into the bank?
A. It is still there.
Q. Are you the only heir of your husband?
66 A. Yes, sir.
Q. Did he leave any children?
A. No, not any.

Counsel for the plaintiff then offered in evidence the Carlisle Table or Mortality, to show that a person of the age of 45 years has an expectancy of 24.46 years.

Counsel for the plaintiff then offered in evidence the statute of the State of Michigan, entitled "An act to prescribe the liability of common carrier railroad companies to their employés" approved May 19, 1909, which was refused by the court, to which action the plaintiff excepted and offered the statute, reading as follows:

"(No. 104.)

An Act to Prescribe the Liability of Common Carrier Railroad Companies to Their Employés.

The People of the State of Michigan enact:

SECTION 1. Every common carrier railroad company in this State shall be liable to any of its employés, or, in case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none then for his next of kin for all damages which may result from the negligence of any such railroad Company or from the Negligence of any of its officer-agents or employés, or by reason of any defect or insufficiency due to the negligence of any such common carrier railroad company in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, coal docks or other equipment.

SECTION 2. In all actions hereafter brought against any such common carrier railroad company under or by virtue of any of
37 the provisions of this act to recover damages for personal injury to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar recovery: Provided, that the negligence of such employé was of a lesser degree than the negligence of such company, its officers, agents or employés. Provided, further, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier railroad company of any statute enacted for the safety of employés contributed to the injury of such employé, and such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

SECTION 3. The words "railroad company" as used in this act shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating, or in possession of a common carrier railroad in whole or in part within this State, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

SECTION 4. No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employé, nor the acceptance of any such insurance relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of, such employé; Provided, however, that upon the trial of such action, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit or

indemnity that may have been paid to the injured employé, or, in case of his death, to his personal representative.

68 SECTION 5. No action shall be maintained under this act unless commenced within two years from the time the cause of action accrued.

SECTION 6. Nothing in this act shall be held to limit the duty of common carrier railroad companies, or impair the rights of their employés under existing laws of the State.

SECTION 7. The provisions of this act shall not apply to employés working in shops or offices.

Approved May 19, 1909."

Thereupon the plaintiff rested.

69 *Defense.*

Thereupon the defendant, to maintain the issues on its part, called as a witness in its behalf, Dr. FRANK E. TINKER who, being first duly sworn, testified as follows:

Direct examination by Mr. POTTER:

Q. Give us your full name, please?
A. Frank E. Tinker.
Q. Where do you reside?
A. Lapeer, Mich.
Q. Your profession is what?
A. Practicing medicine.
Q. And how long have you been practicing medicine, doctor?
A. Twenty-six years.
Q. You are a graduate of what university?
A. University of Michigan.
Q. Physician and surgeon, both?
A. Yes, sir.
Q. Do you recall being called to attend a Mr. Wisemiller?
A. Yes, sir.
Q. Who was an engineer on the Michigan Central Railroad that was injured at Carpenter Station or Carpenter Junction, wherever it was?
A. Carpenter Station; yes, sir.
Q. What time did you get to him, about what time was it?
A. About six o'clock, I think.
Q. About six o'clock?
A. I am not positive.
Q. In the morning?
A. Yes, sir.

Q. Where was he at that time?

70 A. He was in Lapeer.

Q. Do you recall who, if any body, was there with him, beside him, there?

A. There were three others of the train crew who were injured and some of the trainmen and some people who had gathered around.

Q. You got there, you say, about six o'clock?
A. I think it was about that time.
Q. Were you present when he died?
A. I was.
Q. About when was it, as near as you can state?
A. Soon after eight o'clock; between that and nine.
Q. How?
A. Between eight and nine.
Q. When you got to him, state to the jury whether he was conscious or unconscious?
A. He was conscious.
Q. Did you have any conversation with him?
A. I did.
Q. Do you recall the conversation you had with him or what the talk was back and forth, or what was said there between you and him or between his associates?
A. I do not recollect the words, but I do the substance of what was said.
Q. Tell us as near as you can recall some of the conversation you had with him?

(Objection by plaintiff; overruled; exception.)

A. The questions I asked him were along the line of his condition and the replies were what you would expect from his condition.
Q. Speak a little louder?
71 A. I say, the questions were in reference to his condition and his feelings, and his replies were in reply to my questions, intelligent replies.
Q. Do you remember the substance of anything he said or anything in particular he said in answer to the questions that were put to him?
A. I do not the words, but I do know of his complaining about our hastening matters more than we did; he wanted to get his arm removed and get into bed and relieved from his pain; asking for water; asking for other of the train men who had been with him.
Q. Did he have any conversation with any of the trainmen while you were there that you remember?
A. Did I?
Q. Did he have any conversation, or they with him?
A. They were about there and would speak to him.
Q. You got there about six o'clock and he died between eight and nine?
A. Yes, sir.
Q. Up to what time was he conscious?
A. He was conscious until a few minutes before he died.
Q. Do you remember the substance of the last thing he said before he went into unconsciousness?
A. The last I heard him say was something about, the same meaning as, "It is all over, boys, good bye"; that he was going and "Goodbye, boys."

Mr. THATCHER: Now, if Your Ho or please, there is nothing disclosed in this answer as to the purpose of this examination for an intelligent cross-examination of this witness. I think it is but fair that counsel should state the purpose of introducing this testimony, which is not disclosed by any pleading. I think
72 it is fair to the court and fair to counsel.

Mr. ROBSON: I think it is fair to state to *the* Your Honor now that the purpose and point of the testimony is this: That it appears unquestionably that the man survived some three or four hours, and that, under those conditions, there is no right of action in this case under the federal act.

Cross-examination by Mr. THATCHER:

Q. Are you the surgeon for the Michigan Central Railroad Company?

A. I am not at present.

Q. Were you at that time?

A. I was not.

Q. Where do you reside, doctor?

A. At Lapeer.

Q. What time in the morning did you first see him?

A. It must have been in the neighborhood of six o'clock; it might have been a little earlier than that.

Q. Did you administer an opiate to him?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Was he suffering much pain?

A. No, sir.

Q. He was not?

A. No, sir.

Q. Where were his injuries? What was the nature of them?

A. His left hand was crushed and the pelvic bones were fractured and the organs of the pelvis were undoubtedly torn, and he complained *of* in attempting to pass water, in attempting to use the catheter; the passage was torn off near the base of the bladder; there was some internal hemorrhage.

78 Q. There were internal injuries there that caused his death?

A. Yes; always with a pelvic fracture you get them. The pelvic bones are the hip bones.

Q. Under the circumstances, do you say a man would not be suffering great pain from the time that he received the unjuries?

A. Yes, sir.

Q. He would not?

A. As a rule, they do not. The greater the injury, the less the pain they have. The shock to the system usually destroys the sense of feeling.

Q. Don't that soon become restored?

A. Not for hours. Little things will cause pain. I have often asked them when they have been run over the leg how it feels and

they say they have no pain, didn't know it until after they attempted to walk.

Q. Don't it affect the mind when they receive a severe injury of that kind that benumbs the senses?

A. No.

Q. In other words, the senses must be numb, must they not, if a person don't feel pain?

The COURT: By "senses" I think he means sensations.

A. No; the senses would not be affected. A severe crushing injury is, as a rule, painless; that is, it does not cause as much pain as the hitting of a finger with a hammer.

Mr. POTTER:

Q. But they may remain conscious at the same time?

A. Certainly. A man who has a leg run over as a rule does not know it until he discovers it later. He may have a little pain but the amount of pain does not correspond with the amount of injury.

74 Mr. THATCHER:

Q. It surely does not go more than ten or fifteen minutes before he realizes the pain?

A. Will you state that again?

(Question repeated.)

A. He discovers something is wrong in that time.

Thereupon the defendant rested.

Thereupon both parties rested.

The above and foregoing is all the evidence offered or received on the trial of the above entitled case.

No other testimony or evidence was offered or received.

Thereupon the defendant moved the court as follows:

Now comes the defendant, The Michigan Central Railroad Company, by Potter and Potter, its attorneys, and moves the court here to arrest the testimony from the jury and direct a verdict in favor of said defendant, and to enter a judgment of dismissal of plaintiff's action; and for the following reasons:

1. The Michigan Statute in terms and effect is the same as the Federal Statute; and the plaintiff having invoked the jurisdiction of the Federal Court in this state, and the Federal Act and the amendment being operative alike in all the states, if there is to be any recovery it must be based on the Federal Statute.

2. Under the Federal Act of April 22, 1908, in force at the date of the injury complained of, no right of action survived to the personal estate or representative of said decedent.

75 3. Section 9 of the Act of April 5, 1910, amendatory of the Act of April 22, 1908, could not affect a right of action, if any, which had already accrued, unless by its express terms it covered causes of action which had already accrued.

4. In that the Act of Congress entitled "An Act relating to the

liability of common carriers by railroad to their employés in certain cases" approved April 22, 1908, and amendments thereto approved April 5, 1910, counted upon in said petition, is unconstitutional and void.

5. The Congress of the United States was and is without power or authority to enact laws upon the subject-matter of said act.

6. The Congress of the United States was and is without power or authority to regulate or control, the relations of employer and employé or of master and servant, or principal and agent, for the ends and purposes set forth and expresses in said act.

7. The subject-matter of said act and the respective rights, duties and liabilities of the several persons, mentioned in, and within the purview of said act, is solely within the jurisdiction and cognizance of the several states of the United States, and said Act violates and is contrary to the provisions of the tenth amendment to the Constitution of the United States.

8. Said act while purporting to regulate and control and to create rights, duties, obligations and liabilities affecting and relating to common carriers by railroad while engaging in interstate and foreign commerce, by and under its language and terms, attempts to regulate, control and create rights, duties, obligations and liabilities which do not relate to or affect interstate and foreign commerce and which are not within the intent and meaning of clause 3 of
76 Section 8 of Article 1 of the Constitution of the United States, conferring upon the Congress the power to regulate commerce with foreign nations and among the several states.

9. The Congress of the United States was and is without power to determine the persons to whom any sum recovered by the personal representative of a person entitled to the benefit of said act shall be distributed and to impose such rule of distribution on the courts of the several states, and such provisions are in violation of the tenth amendment to the Constitution of the United States.

10. Said Act in words confers upon the courts of the several states, the power and authority to hear, determine and enforce a cause of action, purporting to be conferred by said act, and prohibits a removal of an action brought in said state courts on said act to the courts of the United States, all of which is in violation of Section 1 of Article III of the Constitution of the United States.

11. The said act is an unlawful interference with and restraint upon the police powers of the several states of the United States.

12. It violates the provisions of the fifth amendment to the Constitution of the United States in that it deprives said defendant of its property and liberty of contract without due process of law.

13. It violates the seventh amendment to the Constitution of the United States, in that it purports to and in substance prevents a reexamination of the facts tried by the jury according to the rules of the common law; because said petition does not state a cause of action upon which he can recover in this court, within the terms and meaning of said Act of Congress.

77 The foregoing motion was argued by the respective counsel, and, on consideration thereof, overruled by the court to which action of the court the defendant duly excepted.

Mr. THATCHER: At this point, if Your Honor please, I am of the opinion that the plaintiff should, and he does, now make a motion to direct this jury to return a verdict for the plaintiff, and the only thing we need to argue will be the amount of damages.

The COURT: That thought was in my mind when the defense rested. Is there any controversy upon any question, as the court views the case, except the question of the amount of damages? Are not the facts all conceded? Is there any other question here?

Mr. POTTER: We think that is true, if Your Honor please.

The COURT: Under this statute, if there is any element of contributory negligence, that arises in arguing the amount of damages of course.

Mr. THATCHER: I suggested it so that I would know how to conduct this argument.

The COURT: That is my view of the record, Mr. Thatcher.

Mr. POTTER: Your view is simply on the question of compensation.

The COURT: Yes.

Mr. POTTER: That does not deprive us of our right as to
77a contributory negligence entering into it.

The COURT: No, I think that, under this statute, that is involved in the argument as to compensation.

Mr. THATCHER: I would just as soon proceed now.

The COURT: We can hardly finish the argument this evening. This record should show that the objection to the introduction of the Michigan statute is sustained. Do you wish to except to that?

Mr. THATCHER: I would like to preserve the question, so that it may be reviewed, if necessary.

The COURT: Very well.

(Thereupon the court adjourned until October 7, 1910, 9 A. M.)

(OCTOBER 7, 1910—9 a. m.)

Trial resumed.

Mr. Thatcher made an argument to the jury.

Mr. Robson was making an argument to the jury, when the following took place:

Mr. THATCHER: I am sorry to interrupt counsel. I understood there was a concession made last night by counsel for defendant in the presence of the Court. Now, if that concession—which I need not state the substance of—is a matter of record in this court, I do not think this argument as to whether——

The COURT: The only question in the Court's mind is the question of the amount of recovery.

77b Mr. THATCHER: If that be true, I do not think counsel have a right to go into any such speculation as he is now indulging in.

Mr. POTTER: There is no speculation at all.

The COURT: It seems to the Court that the undisputed facts of this case impute liability to the company under this act. There is no evidence here that the company, independent of the acts of its subordinates, was negligent, but the company suffers through the

occurrence of an act of this character, which could not possibly arise unless some one under the company was at fault. That is all there is to it. We all agree on that.

Mr. Robson: I have no desire to depart from that, and I do not believe that I was doing that, if Your Honor please.

The Court: Proceed, Mr. Robson. The Court will take care of that in the instructions.

Thereupon the case was argued to the jury by counsel for the respective parties, and thereafter the Court charged the jury as follows:

77c The Court: Gentlemen of the jury, this action is brought under the provisions of an Act of Congress passed about two years ago and, as the court views the facts of this case and the record made, as counsel in the case were content to leave it, the only question left for your consideration is the amount of damages which the plaintiff should recover at your hands, and the only duty of the court is to instruct you as to the method by which you are to ascertain such damages.

I wish to suggest to you at the outset that, while the amount of damages is left to your sound discretion, yet that does not mean that you are to speculate, to enter into the realms of speculation, for the purpose of fixing the amount of damages, but that you must confine yourselves to the evidence and the fair deductions and inferences to be drawn from the evidence, such as men of fair intelligence might draw, applying the rules which the court will attempt to give you to guide your consideration of the testimony.

The facts, as they are left to you, show that the railroad company took such precautions, by way of orders, as were calculated to save this very accident, and, if the company is liable (and the court is assuming that it is) it is liable because of the infirmity of
78 some agency, human or otherwise, which the company set in motion and which violated the reasonable expectations of the company in the performance of its duty. So that there is no room in the consideration of this case for the operation of any feeling that the railroad company should be punished for this result. It is to be required only to fairly compensate the person who suffers as a result of this accident.

In cases of this class, and in this case, with this duty before this jury, there is the highest and loudest call for cool-headed, fair-minded, dispassionate consideration of the facts, for the attempt on your part should be to divest yourselves of any feeling other than to mete out, under the law, exact justice between the contending parties in this case without reference to the fact that one is a widow and the other is a railroad corporation, but solely, in view of your duty, to treat them with equal consideration, void of any sort of reflection upon the diversity of their conditions and the different relations they sustain to the public.

This action is to award the widow of Mr. Wisemiller pecuniary, financial, compensation for the loss that she has sustained through the death of her husband, in the particulars before you. You will

observe at the outset that you are not to take into consideration for any purpose here the fact that this lady, if that be a fact, (and we may assume that it is the fact, from our common observation of life), suffered anguish and sorrow as a result of the loss of her companion. In no wise are you authorized in this case to award her damages by way of a balm to her feelings; that consideration should be dropped out of the case absolutely. In considering what damages the administrator—who is acting as the vehicle, the conduit, through whom damages will be conveyed to the person suf-
79 fering them—should recover, these are the things and these are the only things which you have any right to take into consideration:

You should consider the age of Mr. Wisemiller at the time of his death, the state of his health, his habits, the probable expectation of life to him, how long he might reasonably be expected to live; and in that behalf you are not controlled absolutely by the tables of mortality introduced in evidence. You are permitted to consider the experience of men dealing with such subjects, their observations, what the experiences of insurance companies dealing with the lives of men have shown as to the probability of the expectation of life of the average man of the age of Mr. Wisemiller. That is the one element of your consideration, as to how long he might reasonably have been expected to live were it not for this accident. But, in determining the probability of his expectation of life, you may also consider his habits, his state of health and the occupation in which he was engaged and its probable effect upon a continuance of health or a continuance of life itself. That means, of course, that you are to consider the character of his employment and its emoluments, its rewards in money, his wages; you may consider what the evidence shows the disposition of his wages was as he used them and handled them. You may consider, regarding the character of his employment, the probable duration of his ability to continue in that line of employment and to earn such wages, and any other fact in evidence which goes to enlighten you in your judgment as to the pecuniary, financial benefit which would have accrued to Mrs. Wisemiller through her husband's earning power had Mr. Wisemiller survived. Consider, also, the age of Mrs. Wisemiller and her expectation of life as compared with the probable expectation of life of her husband.

80 The court does not mean that you are to consider that there would devolve upon her, accrue to her, had he lived, the benefit of all his earnings, but you are to consider, so far as the evidence enlightens you, what her probable share of such earnings would have been, for that, and that alone, of course, constitutes her financial interest in his earnings. Then, in addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men and measure, as far as you can, what it would have reasonably been worth to Mrs. Wise-

miller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband.

When the jury has taken these elements into consideration and has made an estimate upon what this life amounted to in the aggregate, in a financial way, should it have existed but for this accident to the husband, then you have a further duty. You are to remember that these wages were matters of recurrence; they did not come all at once and would not have come all at once to Mr. Wisemiller, but they would have come to him as the years rolled on. This care and advice to Mrs. Wisemiller from her husband, had her husband lived, would have been a matter of the rolling on of the seasons and the years; so that the aggregate value of what you estimate it would have been for the expectation of their life together would not be the measure of her damages, but the present value of what would have come or inured to her benefit for that period, and, when you reach the point where you have satisfied your minds as to what would have come to her by way of financial benefit through the
81 years of their reasonable expectation of life together, had he lived, then you must reduce that sum by computing what the value of that sum would be if it came to her all at once at the present time and she not be required to wait fifteen years, we will say, for example, for the portion that would come to her fifteen years from now, fourteen years for the portion that would come to her fourteen years from now, and so on down the line, but she would get those portions at once, for manifestly, a sum of money that is to come to one at a distant period of time, if it were to be advanced at the present time, would be greatly diminished in amount, diminished according to the distance in the future when it ordinarily would have been paid.

Mr. POTTER: May I suggest a word there? That this pecuniary loss was the probable pecuniary loss to the next of kin.

The COURT: Yes; I do not want to be misunderstood. In all of this consideration, the jury is to determine what the probable loss has been to the beneficiary of this law in this case.

Your first duty is to determine the full damages under these rules which I have attempted to give you, and, if you find from this evidence that Mr. Wisemiller was without fault himself, as an employé of the company, then your verdict should be for those full damages. But, if you find from this evidence that some want of ordinary care on his part in the performance of his duties contributed to the result, then it would be your duty to reduce the amount of full damages by apportioning against the plaintiff here, as the representative of Mr. Wisemiller, so much of the full damages as represents your judgment of what he should bear, and those claiming dam-
82 ages through him should bear, as the measure of his negligence and want of ordinary care in the performance of his duty. This is plainly to be seen a delicate and difficult duty for you to perform, and there is no standard but your own enlightened and unbiased judgment and opinion upon such a subject. There must be in this testimony and in this record some evidence, in your judgment, of negligence of Mr. Wisemiller—some evidence of the lack

of ordinary care upon his part—which directly contributed to this injury, before you can attempt to reduce the full damages.

Contributory negligence on his part such as you have a right to consider is some act on his part which, in your judgment, a reasonably prudent man, occupying the responsible position that he occupied, would not have performed in the emergency of that situation, or some failure to act which a reasonably prudent man, in your judgment, occupying such a position, would not have indulged in, in such a position as that and under such circumstances, which act or failure, if either is seen by you to have existed, directly contributed, had a part in producing the result which is at the basis of this action.

It is plain here that the position in which Mr. Wisemiller was placed on this occasion, whether it were a position of more or less danger, depended upon the line of conduct, the action, of the engineer of the southbound train, and so, in determining whether or not Mr. Wisemiller was imprudent, either in an act of commission or an act of omission, contributing to the accident, you should have in mind how far he had a right to rely upon the engineer of that southbound train, being himself careful and prudent and acting in obedience to the orders of the company. So you will not do justice to this phase of the situation unless you attempt to put your-
83 selves in the position of Mr. Wisemiller under the circumstances of that accident and in that emergency and determine how a reasonably prudent man, having the responsibilities that devolved upon him, and having the right to assume that he was meeting a reasonably prudent man in charge of the southbound train, would have acted, and, if this jury is of the opinion, after considering all the facts and circumstances, that there was some failure on the part of Mr. Wisemiller, some substantial failure on his part, to measure up to the full responsibility of his position as a reasonably prudent man would have appreciated it and have attempted to exercise it, then you should reduce the full damages resulting from his death to his widow by such an amount as will measure your judgment of the portion which that lack of care, that contributory negligence, on his part, if any, sustained to the accident, to the result.

Is there anything for the plaintiff?

Mr. THATCHER: We wish to except to the failure of the court to give request No. 2.

(Said written request No. 2 of the plaintiff is in the following language:

"The jury is instructed that under the evidence in this case there is no proof whatever of negligence on the part of the decedent Albert Wisemiller. You are therefore instructed that you should wholly disregard the claims of the defendant that the decedent was guilty of negligence at the time of receiving the injuries which caused his death.")

We also except to the instructions as given to the effect that the full amount of damages may be reduced by any contributory negli-

gence which the jury may find to have existed on the part of
84 Mr. Wisemiller, for the reason that there is a total absence of any evidence indicating contributory negligence.

Mr. POTTER: The only exception we desire to preserve is to that part of the charge of Your Honor covering the point that the jury may consider, in estimating the probable financial injury to the next of kin or to the widow, the care, advice and counsel that the husband might have given to her during his expectancy, upon the ground that it is too remote and too indefinite to ascertain.

The COURT: Gentlemen of the jury, you are the sole judges of the facts of this case. Counsel have argued the case to you and have suggested to you how the facts appeal to them. You have received these suggestions from counsel on both sides, not as controlling you, but as assisting you to a comparison of the facts themselves and assisting your mental operations, and only for that purpose. You are to solely judge the facts. Nothing that the court may have said upon the subjects under discussion to you in this charge, if the court has said anything that might be construed in that way, is to be taken by you to deprive you of the fullest and fairest opportunity to judge of the facts for yourselves. The court has no right to tell you what the facts are when facts are in dispute.

Being the sole judges of the facts, you become necessarily the sole judges of the credibility of the witnesses. It is your privilege to accept the testimony of any witness in full or to reject the
85 testimony of any witness in full, or to accept part of the testimony of such witness or to reject part of the testimony; a privilege, however, which you can only exercise reasonably, not arbitrarily. You must find in the conditions of the case, in the conflict of testimony, in the manner of giving testimony by the particular witness, in some circumstances appearing before you, either in oral testimony or in the evidence of your other senses, that will warrant you in rejecting the testimony or any portion of the testimony of any witness, before you are permitted to disregard such testimony. You cannot do that arbitrarily, from mere whim. In measuring the credibility of witnesses, in addition to what I have said in the last sentence, you are permitted to consider the interest that any witness may have in the outcome of this case, directly, the manner of giving testimony, his apparent candor or the lack thereof, his mental ability and his capacity to see things and know things and tell you what he sees and knows. In short, you are permitted to take the measure of each witness, as you measure the men with whom you come into daily contact in your every day affairs and apply, in testing the credibility of such witness, the very same rules that you use, consciously or unconsciously, in determining how far you will repose faith and credit in the men with whom you come into contact.

I believe I will submit to you but one form of verdict, and that is a verdict for the plaintiff, which reads (omitting the caption) as follows:

"We, the jury in this case, being duly impaneled and sworn, do

find upon the issues joined for the plaintiff, and do assess his damages in the sum of $—."

86 Having gone into the consideration of the question of damages—the only question left to you—when you reach a determination of the amount, under the rules which the court has given you, you will fill a statement of such amount in the blank space of your verdict and cause such verdict to be returned in open court over the signature of your foreman. This verdict should be, as I have said, for the full amount of probable damages, probable financial loss to the widow of Mr. Wisemiller as the result of this accident unless you find that the full amount should be reduced in your attempt to apportion and compare such negligence as you may find, if you find any, was contributed to the accident by Mr. Wisemiller, as I have instructed you, with the negligence generally which brought about that result.

87 Thereupon the jury retired, and thereafter returned into court with its verdict, which verdict was in favor of the plaintiff and against the defendant, as appears from the record herein.

Thereupon the court entered judgment upon said verdict which said judgment is in favor of the plaintiff and against the defendant, as appears of record herein, to which action of the court the defendant duly excepted.

Thereupon, and within three days from the rendition of said verdict and entry of said judgment, the defendant filed its written motion for a new trial herein, as appears of record herein, upon the grounds and for the reasons therein set forth. Said motion coming on to be heard, it was argued by counsel and submitted to the court, and the court, on consideration thereof, overruled the same; to which action of the court the defendant duly excepted.

And now comes the defendant and presents to the court this, its bill of exceptions, taken on the trial of this case, and asks that the same be allowed and signed and ordered to be made part of the record herein. Upon consideration thereof, the court finds the same to be a true and correct bill of exceptions and contains all of the evidence offered and received on the trial of this case, and the same is allowed and ordered to be filed as a part of the record in this case, this 3rd day of January, 1911.

(Signed) JOHN M. KILLITS,
Trial Judge.

88 (Endorsement:) In the Circuit Court of the United States, Northern District of Ohio, Western Division. No. 2187. Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff, vs. Michigan Central Railroad Company, Defendant. Defendant's bill of exceptions. Filed Jan. 3, 1911. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

89 December Term, A. D. 1910, To wit: January 3, 1911.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Journal Entry Allowing Filing of Bill of Exceptions.

This 3rd day of January, 1911, came the above named defendant by its attorneys and presented to the Court its true bill of exceptions taken at the trial herein. And the Court having examined the same, and finding the same to be in all respects true and correct, does now allow, sign and seal the same and order it made a part of the record hereto, but not spread at large upon the journal.

90 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 2187. Law Docket.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Petition for Writ of Error.

Now comes The Michigan Central Railroad Company, defendant herein, and says that on or about the 7th day of October, A. D. 1910, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceeding had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

FRANK E. ROBSON,
POTTER & POTTER,
Attorneys for the Defendant,
The Michigan Central Railroad Company.

HENRY RUSSEL, *Counsel.*

Allowed.
JOHN M. KILLITS.

91 (Endorsement:) No. 2187. United States Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Admr., Plaintiff, vs. The Michigan Central Railroad Co., Defendant. Petition for Writ of Error. Filed Jan. 28, 1911. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Potter & Potter, Attorneys, 1131 Nicholas Building, Toledo, Ohio.

92 In the United States Circuit Court, Northern District of Ohio, Western Division.

No. 2187. Law Docket.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Assignment of Errors.

The defendant in this action, The Michigan Central Railroad Company, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon the trial of this case, to-wit:

1. The Court erred on the conclusion of the introduction of testimony for both plaintiff and defendant, in refusing to grant the motion of said defendant to arrest the testimony from the jury and direct a verdict in favor of said defendant, and to enter a judgment of dismissal of plaintiff's action.

2. The Court erred in refusing to direct a verdict for the defendant for the reason that under the Federal Act of April 22, 1908, in force at the date of the injury complained of, no right of action survived to the personal estate or representative of said decedent, which reason was set forth in its said written motion.

3. The Court erred in refusing to direct a verdict for the defendant for the reason that Section 9 of the Act of April 5, 1910, amendatory of the Act of April 22, 1908, could and did not
93 affect a right of action, if any, which had already accrued, which reason was set forth in its said written motion.

4. The Court erred in refusing to direct a verdict for the defendant for the reason that the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their employés in certain cases" approved April 22, 1908, and amendments thereto approved April 5, 1910, relied upon in said plaintiff's petition, is unconstitutional and void, which reason was set forth in its said written motion.

5. The Court erred in refusing to direct a verdict for the defendant for the reason that the Congress of the United States was and is without power or authority to enact laws upon the subject-matter of said Act, which reason was set forth in its said written motion.

6. The Court erred in refusing to direct a verdict for the defend-

ant for the reason that the Congress of the United States was and is without power or authority to regulate or control, the relations of employer and employee or of master and servant, or principal and agent, for the ends and purposes set forth and expressed in said Act, which reason was set forth in its said written motion.

7. The Court erred in refusing to direct a verdict for the defendant for the reason that the subject-matter of said Act and the respective rights, duties and liabilities of the several persons mentioned in, and within the purview of said Act, is solely within the jurisdiction and cognizance of the several states in the United States * * * which reason was set forth in its said written motion.

8. The Court erred in refusing to direct a verdict for the defendant for the reason that said Act violates and is contrary to
94 the provisions of the tenth amendment to the Constitution of the United States, which reason was set forth in its said written motion.

9. The Court erred in refusing to direct a verdict for the defendant for the reason that said Act, while purporting to regulate and control, and to create rights, duties, obligations and liabilities affecting and relating to common carriers by railroad while engaged in interstate and foreign commerce, by and under its language and terms, attempts to regulate, control and create rights, duties, obligations and liabilities which do not relate to or affect interstate and foreign commerce, and which are not within the intent and meaning of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, conferring upon the Congress the power to regulate commerce with foreign nations and among the several states, which reason was set forth in its said written motion.

10. The Court erred in refusing to direct a verdict for the defendant for the reason that the Congress of the United States was and is without power to determine the person or persons to whom any sum recovered by the personal representatives of a person entitled to the benefit of said Act, shall be distributed, and to impose such rules of distribution on the courts of the several states; and such provisions are in violation of the tenth amendment to the Constitution of the United States,—which reason was set forth in its said written motion.

11. The Court erred in refusing to direct a verdict for the defendant for the reason that said Act in words confers upon the courts of the several states the power and authority to hear, determine
95 and enforce a cause of action, purporting to be conferred by said Act, and prohibits the removal of an action brought in said state courts on said Act, to the courts of the United States; all of which is in violation of Section 1 of Article III of the Constitution of the United States,—which reason was set forth in its said written motion.

12. The Court erred in refusing to direct a verdict for the defendant for the reason that the said Act is an unlawful interference with and restraint upon the police powers of the several states of the United States, which reason was set forth in its said written motion.

13. The Court erred in refusing to direct a verdict for the defendant for the reason that it violates the provisions of the fifth amendment to the Constitution of the United States in that it deprives the said defendant of its property and liberty of contract without due process of law, which reason was set forth in its said written motion.

14. The Court erred in refusing to direct a verdict for the defendant for the reason that it violates the seventh amendment to the Constitution of the United States, in that it purports to and in substance prevents a re-examination of the facts tried by the jury according to the rules of the common law; because said petition does not state a cause of action upon which he can recover in this court, within the terms and meaning of said Act of Congress, which reason was set forth in its said written motion.

15. The Court erred in its charge to the jury on the measure of damages, in this, to-wit:

"It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experience as men, and measure as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

96

16. The Court erred in each and every particular of its general charge in this, to-wit: that the Court should have withdrawn the issues from the jury and directed a verdict for the defendant.

Wherefore, the defendant prays that the judgment of said Circuit Court may be reversed, and that judgment be entered in favor of said The Michigan Central Railroad Company, plaintiff in error.

FRANK E. ROBSON,
POTTER & POTTER,
Attorneys for the Michigan Central Railroad Company.

HENRY RUSSEL, *Counsel.*

(Endorsement:) No. 2187. United States Circuit Court, Northern District of Ohio, Western Division. Daniel B. Vreeland, Admr., Plaintiff, vs. The Michigan Central Railroad Company, Defendant. Assignment of errors. (Allowed, Killits, Judge.) Filed Jan. 28, 1911. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O. Potter & Potter, Attorneys, 1131 Nicholas Building, Toledo, Ohio.

97 December Term, A. D. 1910, to-wit, January 28th, 1911.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187, Law Docket.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased, Plaintiff,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Order Allowing Writ of Error.

This 28th day of January, 1911, came the defendant, The Michigan Central Railroad Company, by its attorneys, and filed here and presented to the Court its petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, upon the defendant, The Michigan Central Railroad Company, giving bond according to law, in the sum of Fifteen thousand ($15,000) dollars, which shall operate as a supersed-as bond.

98 National Surety Company.

Know all men by these presents, that the National Surety Company, a New York corporation, having its principal office in the City, County and State of New York, doth hereby make, constitute and appoint O. R. Leonard, of Detroit, State of Michigan, its true and lawful Attorney in Fact, with full power and authority to sign, execute, acknowledge and deliver in its name, place and stead, as surety, bonds, undertakings and writings obligatory in the nature thereof, and when said bonds, undertakings and writings obligatory are signed by the said O. R. Leonard as such Attorney in Fact, to bind the Company as fully and to the same extent as if the same were signed by the President of the Company, sealed with its common seal, and duly attested by its Secretary, and the said Company hereby ratifies and confirms all the acts of the said Attorneys done pursuant to the power and authority herein given.

This Power of Attorney is made and executed in accordance with and by authority of a certain By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the fourth day of February, 1908, a certified copy of which is hereto attached.

In witness whereof, the National Surety Company has caused these presents to be signed by its 1st Vice President, and its corporate

seal to be hereto affixed, duly attested by its Ass't Secretary, this 25th day of May, A. D. 1908.

NATIONAL SURETY COMPANY,
[SEAL.] By WILLIAM J. GRIFFIN,
First Vice President.

Attest:
WM. I. HAWKS,
Ass't Secretary.

99 STATE OF NEW YORK,
County of New York, ss:

On this 25th day of May A. D. 1908, before me personally came William J. Griffin, to me known, who being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the first Vice President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] WM. F. GAYNOR,
Notary Public for County of Kings.

Certificate filed in New York, Queens, Richmond and Westchester Counties.

Copy of By-Law.

Be it remembered, that at a meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, A. D. 1908, a quorum being present, the following By-Law was adopted:

"Article XII. "Resident Officers and Attorneys in Fact."

"SECTION I. The President, or First Vice-President, may from time to time appoint resident vice-presidents, resident assistant secretaries and attorneys in fact to represent and act for and on behalf of the Company, and either the President, First Vice-President, the Board of Directors or the Executive Committee may at any time remove any such resident vice-president, resident assistant secretary or attorney in fact and revoke the power and authority given him."

"SECTION 4. Attorneys in Fact. Attorneys in fact may be given full power and authority to execute for and in the name and on behalf of the Company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a
100 bond, recognizance or conditional undertaking; and any such instrument executed by any such attorney in fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, Wm. I. Hawks, Ass't Secretary of the National Surety Company, do hereby certify that the above and foregoing is a full, true and correct copy of Sections I and 4 of a By-Law adopted by the Board of Directors of said Company, at a meeting held on the fourth day of February, A. D. 1908 and now in force, as the same appears upon the records of the Company now in my possession and custody as Ass't Secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 25th day of May, A. D. 1908.

WM. I. HAWKS,
[SEAL.] *Ass't Secretary.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Howard Abrahams, Ass't Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said National Surety Company on the 25th day of May A. D. 1908, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 19th day of February, A. D. 1910.

HOWARD ABRAHAMS,
[CORPORATE SEAL.] *Ass't Secretary.*

(Endorsement:) Power of Attorney of National Surety Company to —— ——.

101 Know all men by these presents, That we, The Michigan Central Railroad Company, as principal, and The National Surety Company of New York, as sureties, are held and firmly bound unto Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, in the full and just sum of fifteen thousand ($15,000.00) Dollars, to be paid to the said Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of January, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Term of the Circuit Court of the United States for the Northern District of Ohio, Western Division, in a suit depending in said Court, between the said Daniel B. Vreeland, Administrator of the estate of Albert Wisemiller, deceased, as plaintiff, and the Michigan Central Railroad Company *was* defendant a judgment was rendered against the said The Michigan Central Railroad

Company in the sum of Twelve Thousand ($12,000.00) Dollars, and the said The Michigan Central Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Daniel B. Vreeland, Administrator of the estate of Albert Wisemiller, deceased, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C. on the 27th day of March next.

102 Now, the condition of the above obligation is such, That if the said The Michigan Central Railroad Company shall prosecute its action to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
By W. C. BROWN, *President.*

[CORPORATE SEAL.]

NATIONAL SURETY COMPANY,
By O. R. LEONARD, *Attorney in Fact.*

[CORPORATE SEAL.]

Sealed and delivered in presence of

——— ———.

Approved by
JOHN M. KILLITS,
District Judge.

(Endorsement:) No. 2187. Daniel B. Vreeland, Administrator, vs. The Michigan Central Railroad Company. Bond on Writ of Error. To the Supreme Court of the United States. Filed Jan. 28, 1911. B. C. Miller, Clerk, U. S. Circuit Court, N. D. O.

December Term, A. D. 1910, to-wit, February 23, 1911.

Present: The Honorable John M. Killits, U. S. District Judge.

No. 2187. Law.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY.

For good cause shown to the Court the time for filing the record in this cause in the Supreme Court of the United States, pursuant to the writ of Error sued out herein, is extended until the 6th day of March, 1911.

103 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Circuit Court of the United States for the Northern District of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, plaintiff, and The Michigan Central Railroad Company, defendant, a manifest error has happened, to the great damage of the said The Michigan Central Railroad Company as by its complaint appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 27th day of February next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 28th day of January, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk*,
By J. W. WILSON,
Deputy Clerk of the Circuit Court of the United States for the Northern District of Ohio.

Allowed by
JOHN M. KILLITS,
District Judge, Sitting as Circuit Judge.

Filed Jan. 28, 1911. B. C. Miller, Clerk U. S. Circuit Court, N. D. O.

104 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance of the command of the writ of error within, I, B. C. Miller, Clerk of the Circuit Court of the United States for the Northern District of Ohio, herewith transmit a true — of the record, bill of exceptions, assignment of errors, and all proceedings in this case of Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, deceased, vs. The Michigan Central Railroad Company, lately pending in the Circuit Court of the United States for the Northern District of Ohio, under my hand and seal of said court.

Witness my official signature and the seal of said Circuit Court at the city of Toledo, in said District, this 10th day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

B. C. MILLER,
Clerk of the Circuit Court of the United States for the Northern District of Ohio,
By J. W. WILSON,
Deputy Clerk.

105 THE UNITED STATES OF AMERICA, *ss:*

To Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 27th day of February next, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Ohio, wherein The Michigan Central Railroad Company, is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Toledo, in the Circuit and District above named, this 28th day of January, in the year of our Lord one thousand nine hundred and eleven.

JOHN M. KILLITS,
District Judge, Sitting as Judge of the Circuit Court of the United States for the Northern District of Ohio.

106 *U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Toledo, Ohio, Jan. 28, 1911, and on the same day, at the same place, I served it on the within named C. A. Thatcher, by delivering to him, personally, a true and certified copy hereof, with all endorsements thereon.

HYMAN D. DAVIS,
U. S. Marshal,
By A. F. OWENS, *Deputy.*

Marshal's Fees.

Service	2.00
Travel—1	.06
	2.06

U. S. Marshal's No. 3949.

107 Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 2187. Law.

DANIEL B. VREELAND, Administrator of the Estate of Albert Wisemiller, Deceased,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and correct copy of the record, bill of exceptions, assignment of errors, papers, exhibits and proceedings in the above entitled case as are necessary to the hearing in the Supreme Court of the United States; and there is annexed to and transmitted therewith a true and complete copy of the Opinion filed in the case, and the Writ of Error and Citation issued therein.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court at Toledo, in said District, on this 1st day of March, A. D. 1911, and of the 135th year of the Independence of the United States of America.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*
By J. W. WILSON,
Deputy Clerk.

Endorsed on cover: File No. 22,561. N. Ohio C. C. U. S. Term No. 535. The Michigan Central Railroad Company, plaintiff in error, vs. Daniel B. Vreeland, administrator of the estate of Albert Wisemiller, deceased. Filed March 4th, 1911. File No. 22,561.

13

Supreme Court, U. S.
FILED.
OCT 30 1912
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

No. 22,561.

OCTOBER TERM, 1912.
No. 242.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

FRANK E. ROBSON,
Attorney for The Michigan Central Railroad Company, Plaintiff in Error.

HENRY RUSSEL,
EMERY D. POTTER,
CHARLES P. CARROLL,
Counsel.

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FRANK E. ROBSON,
Attorney for The Michigan Central Railroad Company, Plaintiff in Error.

HENRY RUSSEL,
EMERY D. POTTER,
CHARLES P. CARROLL,
Counsel.

Three Points Are Discussed in This Brief.

FIRST.

The decision in *Mondue and others vs. Railroad*, 223 U. S., 1, did not deprive this court of its jurisdiction to pass upon other material and substantial questions raised on this record, its jurisdiction having once *rightfully vested*.

SECOND.

The Act of April 22, 1908, 35 U. S. Statutes at Large, p. 65; and the Act of April 5, 1910, 36 U. S., Statutes at Large, p. 291, construed. Plaintiff in error's contention is fully stated at page 7 of this brief.

In support thereof, we cite the following cases, found at pages 8, 10, 11, 13, 14, 15, 16 and 17 of this brief.

Adams vs. Northern Pacific R. R., 116 Fed. Rep., 324.
Alder vs. Fleming, 159 Fed. Rep., 593.
American R. R. Co. vs. Birch, 224 U. S., 547.
City vs. Marfield, 63 Kas., 794.
Dolson vs. L. S. & M. S. Ry., 128 Mich., 444.
Ely vs. Detroit United Ry. Co., 162 Mich., 287.
Holton vs. Dailey, 106 Ill., 131.
Jones vs. McMillan, 129 Mich., 86.
Kellow, Adm., vs. Central Iowa Ry. Co., 68 Ia., 470.
Mulcahey, Admr., vs. Washburn Car Co., 145 Mass., 281.
Northern Pacific R. R. vs. Adams, 192 U. S., 440 and 450.
Nourse, Adm., vs. Packard, 138 Mass., 307.
Oliver vs. Street Ry. Co., 134 Mich., —.
Railway vs. Clark, 152 U. S., 230.
Railway vs. Dawson, Adm., 68 Ark., 1.
Railway vs. Dixon, 179 U. S., 131.

Roundtree vs. Adams Express Co., 165 Fed. Rep., 156.
Sawyer vs. Perry, 88 Maine, 42.
State vs. Grand Trunk R. R. Co., 61 Maine, 144.
Storrie vs. Grand Trunk Elevator Co., 134 Mich., 297.
Sweetland vs. R. R. Co., 117 Michigan, 329.
West vs. Detroit United Ry. Co., 159 Mich., 269.
Michigan "Survival Act," p. 16 of this brief.
Michigan "Death Act," p. 17 of this brief.

THIRD.

Error in the charge of the court to the jury as to the measure of damages. (See page 18 of this brief.)

In support of our contention, we cite the following cases, found on pages 20, 21, 22 and 23 of this brief.

Davis vs. Guarnieri, 45 O. S., 471.
Gas Co. vs. Rogers, 135 S. W., 904.
Holton vs. Dailey, Adm., 106 Ill., 132.
May vs. R. R., 62 N. J. L., 63.
McHugh vs. Schlosser, 159 Penn. State, 480.
Nelson vs. R. R., 140 Mich., 582.
Railroad vs. Bentz, 108 Tenn., 670.
Railroad vs. Johnson, 78 Texas, 536.
Railroad vs. Walker, 125 S. W., 99.
Railroad vs. Wilson, 48 Fed. Rep., 57.
Railway vs. Altemeier, Adm., 60 O. S., 10.
Railway vs. Austin, Adm., 68 Ill., 126.
Railway vs. Golway, 6 D. C. App., 144.
Railway vs. Townsend, 69 Ark., 380.
Steel, Adm., vs. Kurtz et al., 28 O. S., 191 (Approved 45 O. S., *supra*, 481).
Sternfelds vs. Railway, 73 N. Y. App. Div., 494.
Swift & Co. vs. Johnson, 138 Fed. Rep., 867.
Walker vs. R. R., 111 Mich., 518.
Webster's International Dictionary of 1895, on the definition of "care," "advice."

IN THE

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Plaintiff in Error,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

The ground upon which counsel for defendant in error bases his right to maintain this motion to dismiss plaintiff in error's action and affirm the judgment is:

> "That there can now be no actual controversy involving real and substantial rights between the parties to the record, as since the writ of error herein was sued out, *all material questions* raised therein have been passed upon by this court and determined adversely to the contention of the plaintiff in error."

In order to interpose this motion, it became necessary for counsel for defendant in error, by proper and express averment, to bring himself within the provisions of rule 6, subdivision 5, of the rules of this court, and aver: "That it is manifest that the writ or appeal was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument." To sustain these charges and averments and to satisfy Your Honors of the correctness thereof, the burden rests upon the defendant in error.

We deny: "That all the material questions raised therein (the record) have been passed upon by this court and determined adversely to the contention of the plaintiff in error."

We deny: "That the writ was taken for delay only, or that the questions on which the decision of the cause depends are so frivolous as not to need further argument."

And we deny: "That this court is now without jurisdiction."

In order to fully and correctly comprehend and understand the situation and questions involved in this controversy, it is necessary to give here a brief summary of the case.

Daniel B Vreeland, a citizen and resident of Lucas County, Ohio, as administrator of the estate of Albert Wisemiller, upon the 5th day of February, 1910, brought his action in the then Circuit Court of the United States for the Northern District of Ohio, Western Division, against The Michigan Central Railroad Company, a citizen and resident of the State of Michigan, to recover for the benefit of his widow, damages claimed to have been sustained by reason of the death of Albert Wisemiller arising from the negligence of a fellow servant. The action to recover for such damages was brought under the Federal Employers' Liability Act, approved April 22, 1908. Wisemiller was an engineer in the service of the Company and suffered and sustained injuries from which he subsequently died, by reason of the negligence of a fellow

servant, to-wit: an engineer of another freight train (p. 24, Printed Record).

Wisemiller was a citizen and resident of the State of Michigan at the date of his injuries and death. Letters of administration were taken out in Michigan by Vreeland, a resident of Ohio.

Prior to the Act of April 22, 1908, no recovery could have been had in this case, for the reason that the negligent act complained of which caused the injury was the negligence of a fellow servant. The accident happened on the 5th day of October, 1909, at the station, Carpenter, in the State of Michigan.

The answer of the plaintiff in error filed March 5, 1910, will be found on pages 6 and 7 of the printed transcript of the Record. It will not be necessary to recite it here.

No question was made but what the decedent, Wisemiller, and his co-fellow servant and the plaintiff in error were at the time of the accident engaged in, and employed by, said railroad company in interstate commerce.

Plaintiff's right to recover was based upon the provisions of the Federal Act of April 22, 1908, the first and third sections of which are as follows:

> "SECTION 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SECTION 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be *injured* or *killed* shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The questions made in the trial and upon the record, were made in good faith and are as follows:

1. That the Federal Act in question upon which the cause was founded, was inhibited by the Federal Constitution, and if not inhibited by the Federal Constitution, at least not within the legislative power of Congress.

2. That if constitutional, then under and by virtue of the Act of 1908, terms thereof, and decisions of the courts, Wisemiller having survived his injuries, the action sought to be maintained for the benefit of the beneficiary named, to-wit, the widow, did not survive, death of Wisemiller not having been immediate or instantaneous.

3. If one right of action for the injury became vested under the Federal Act, that there could be but one recovery for the injury, to-wit: either, First—for the benefit of the party injured; or, Second—for the benefit of the widow and next of kin.

4. Error in the charge of the court on the measure of damages.

Inasmuch as the Record shows (page 42, Printed Record), that the decedent survived his injuries for several hours after the accident and he was conscious during all that time, that if any vested right of action accrued, it was to him and did not survive for the benefit of his widow or next of kin.

Our contention was, and is, under the statute, that there could not be two vested causes of action, one for the benefit of the injured party, and one for the benefit of his widow or next of kin.

Another question presented by the record is: "That the court erred in its charge to the jury as to the measure of damages." The distinguished judge before whom this case was tried, entertained the opinion, under the Federal Act of 1908, that two causes of action became vested and survived, to-wit:

1. To the party injured, by reason of his surviving the injury; and
2. For the benefit of the widow or next of kin.

But the case at bar only presented the claim of the right of the widow to be compensated for the injury she sustained by reason of the death of the decedent, maintaining thereunder that a right of action survived for her benefit.

The court, on the measure of damages, charged the jury, among other things, as follows:

> "It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and *draw upon your experiences as men*, and *measure as far as you can*, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their lives together, had he lived, the *care and advice* of Mr. Wisemiller, her husband."

At the time of the commencement of this action and its trial in the United States Circuit Court and the prosecution of error in this court, the case of *Mondou vs. Railroad Company* and other cases decided by Your Honors at the October term, 1911, 223 U. S. Reports, page 1, had not been considered and passed upon by this court. The constitutionality of the Federal Act of 1908 was one of the questions directly involved in the case at bar and which gave to this court jurisdiction in the error proceedings, and we submit its jurisdiction

in the cause is, and was, not abrogated by reason of the subsequent decisions in the Mondou and other cases.

After the argument to the court upon the legal questions involved, constitutionality of the Act, the question of survivor, and on the measure or rule of damages, it was announced to counsel that "the only question *in the court's mind* left is the question of the amount of the recovery," the court then held:

1. That the Act in question was constitutional;
2. That the right of action survived for the benefit of the widow.

With this ruling, the only question left for counsel to discuss or argue to the jury was on the measure of damages. The court's ruling on the constitutionality of the act, the right of survivorship, and the measure of damages, were all excepted to by said plaintiff in error and preserved in this record. And as the court well said (page 46, Printed Record) *"As the court views the case,* there is nothing to go to the jury except the question of the measure of damages," which the counsel for plaintiff in error assented to as correct.

But can it be claimed thereby that we were then precluded from testing in this court the question of the constitutionality of the act? Question of the right of survivorship? And the rule as given by the court of the measure of damages? We submit a negative answer is the only one that can be given.

Notwithstanding all the constitutional questions raised by the record in this cause have since been disposed of by Your Honors in the employers' liability cases, *Mondou vs. Railroad Company,* 223 U. S. Supreme Court Reports, there are still left *other material and substantial questions,* neither of which were submitted to, considered, or passed upon by Your Honors in the Mondou and other cases.

Mr. Justice Van Devanter, delivering the opinion of the court at page 46, volume 223, U. S. Reports, stated that the questions presented and discussed by the counsel (in brief) are:

> "1. May Congress in the exercise of its power over interstate commerce, regulate the relations of common carriers by railroad and their employes while both are engaged in such commerce?
>
> "2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question?
>
> "3. Do these regulations supersede the laws of the state in so far as the latter cover the same field?
>
> "4. May rights arising under these regulations be enforced as of right in the courts of the state, when their jurisdiction as fixed by local laws, is adequate to the action?"

The questions, whether a cause of action was vested and survived for the benefit of the beneficiaries named in the act, and such as presented by this record; and did the court err in its instructions to the jury as to the rule to govern in assessing damages, we submit, did not arise and are undecided.

And we insist that these points are made in good faith, have merit, are not frivolous and not interposed for delay.

ARGUMENT.

I.

1. Two separate and independent causes of action did not arise or vest, at the same time, one in favor of Wisemiller, the party injured, and the other for the benefit of the beneficiaries named in the Act.

2. A right of action becoming vested in Wisemiller by reason of his surviving his injuries, such right of action did not survive upon his death to his personal representative under the federal Act of 1908.

3. A right of action becoming vested in Wisemiller, no right of action was vested in or survived to his

personal representative for the benefit of his widow or next of kin.

The Employers' Liability Act in force at the time of this accident (35 U. S. Statutes at large, page 65) made no provision whatever for a survivor in cases where the injured party survived the injury but thereafter died as result of the injury. This is distinctly held in *Fulgham vs. Midland Ry. Co.*, 167 Fed. Reporter, 660, and *Walsh vs. N. Y., N. H. & H. R. R.*, 173 Fed. Reporter, 494.

And Congress, recognizing this construction to be the true one, amended the act (April 5, 1910, 36 U. S. Statute at Large, 291) by adding a new section which expressly created a survivor of a vested right of action for the benefit of the widow or next of kin. The amendment of April 5, 1910, could have no retroactive operation, there being nothing in the act itself in terms making it retroactive in its operation. So the amendment of April 5, 1910, did not create a right of action for this injury which occurred in February, 1909.

In the case at bar, the record distinctly shows (page 42, Printed Record), that Wisemiller survived the accident and injury for several hours, and was perfectly conscious of his situation.

The question, therefore, squarely presented, is: Whether the provisions of the Federal Act as it stood in 1908, having vested a right of action in Wisemiller, he having survived the injury, also vested at the same time a separate, independent right of action for the benefit of the widow and next of kin, by reason of the subsequent death of the party injured, death resulting from his injury.

Our construction of the statute is *that a right of action having* vested in Wisemiller by reason of his having survived the injury, that no separate, independent right of action was vested in favor of the personal representative for the benefit of the widow. Also that under the Act of 1908, when Wisemiller died, no vested right of action survived.

That had death been "immediate," "instantaneous," no right of action could have vested in him, (a person who is dead); but, in *case of "immediate," "instantaneous* death," a right of action, under the statute, vested in the personal representative of the decedent for the benefit of the widow and next of kin.

The distinguished judge who tried this case was of the opinion that the Act of April 22, 1908, covered "consequential death" as well as "instantaneous death," and that the right of action conferred for the benefit of the widow was independent of, and not connected with, the right of action for the personal injury.

The view of the court in this regard, we think, was erroneous and that the true construction to be given to the statute is: "That the action for death should be construed to mean 'instantaneous death.'" And that the "cause of action" is the negligent injury or killing, and the "cause of action," if any accrued within the meaning of Section 6 of the Act (which imposed a limitation of time within which the action may be brought) arose at the time of the negligent act and not at the time of death. In other words, there cannot be, under the statute, two points of time from which the statute of limitations commences to run, otherwise we would have an anomalous condition of an action for personal injury continuing for two years from the time of the accident, and an action for both, continuing beyond that period, which might be any reasonable period of time from two to ten years.

The view that there might be *two recoveries* is distinctly prohibited by the new section 9, added in 1910, amendatory of the Act of 1908; for the language there used tends to sustain the position that there is vested but a single cause of action; that is to say for the negligent act causing "instant" death; or causing the *personal injury* to the party injured.

That *this* action could survive to the widow, only by reason of the instantaneous death of the decedent is confirmed by the following provision of section 3 of the Act of 1908: "No such employe who may be *injured, or killed,* shall be held to have been guilty, etc."

We can hardly conceive that when Congress declared there should be but *one recovery,* it gave an option to the claimant to elect whether suit should be brought for the personal injury, or for the death; and thus gamble upon the amount of damages, choosing that which they thought might render the most in damages. The elements governinig the measure of damages would necessarily vary according to the age, extent of personal suffering, earnings, habits, capacity, and many other questions. We submit what Congress intended, and which is the true construction, that the claimant should have a right to allow the jury to determine whether or not there was instantaneous death or a survivor. In short, if the party survived the injury, living for an appreciable period, during which he is conscious, a cause of action was vested in him; and under the amendment of 1910, Sec. 9, survived. And if he did not survive the injury and was instantaneously killed, then the cause of action would vest, under the death portion of the statute, in favor of the widow or next of kin.

The view that there might be two recoveries under a similar act was announced by the Federal Court of Appeals in the case of *Adams vs. Northern Pacific,* 116 Fed. Reporter, 324.

This rule, however, was distinctly overruled on appeal to the Supreme Court of the United States in an opinion delivered by Mr. Justice Brewer, in the case of the *Northern Pacific R. R. vs. Adams,* 192 U. S., 440, the second of the syllabi of which case reads as follows: "A railroad company is not under two measures of liability, one to the passenger (decedent) and the other to his heirs. The latter

claim under him and can recover only in case he could have recovered had he been injured only and not killed." At page 450, case just cited, speaking of the heirs of the party injured, said: "They claim under him and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation—one to the passenger (deceased), and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages." This view, we think, is strongly supported in the following cases:

American R. R. Co. vs. Birch, 224 U. S., 547.
Roundtree vs. Adams Express Co., 165 Fed. Rep., 156.
Alder vs. Fleming, 159 Fed. Rep., 593.

The case of *Seaboard vs. Allen,* 192 Fed. Reporter, 180, while based on the Alabama statute, is favorable to this view.

The Federal Act of 1908 is in derogation of the common law and should be strictly construed, that is to say, not beyond its express terms and limitations.

It must be conceded that the very language of the act itself, when analyzed, contemplates that there could be but one vested right of action, to-wit: in favor of and for the benefit of the party injured where he survived the injury, *or,* for the benefit of the widow and next of kin, in case no right of action vested in the party injured.

There cannot be two independent and separate rights of action vesting at the same time, one in Wisemiller, the party injured, and in his personal representative for the benefit of the widow and next of kin.

We submit, that Wisemiller, having survived his injury, there became vested in him, under the statute of 1908, *a right of action for the injury he sustained,* and what difference does it make whether he survives the injury a few hours, a

few days, months or years, death finally resulting from the injury? If Mr. Wisemiller, having survived his injury for several hours, or perhaps, days, perfectly conscious in the meantime of his situation, had settled, or agreed to settle, in writing, with the railroad company for his injury, and the company had agreed in writing to pay, or had paid him, full and fair compensation for all the injuries he sustained, present and prospective, could it have been contended—Wisemiller thereafter having died from the result of the injury—that a separate cause of action could be maintained by the personal representative for the benefit of the widow and next of kin? We submit that a negative answer to the interrogatory is the only correct one that could be given.

What difference does it make as to the duration of Wisemiller's surviving the injury? If he lived after the accident and was conscious, and death was not immediate, instantaneous, then by law and under the statute of 1908, there became vested in him an absolute right of action; and if we are correct in this, no right of action became vested in the personal representative for the benefit of the widow and next of kin, more than if Wisemiller had lived a week, a month, or a year from his injury.

To vest a right of action in the personal representative for the benefit of the widow and next of kin, Wisemiller's death must have been "immediate," "instantaneous," so as to preclude the vesting of any right of action in Wisemiller, the party injured, for in such case, when death was "immediate," "instantaneous," no right of action became vested in Wisemiller, the party injured.

By the amendment made in 1910 of the Act of 1908, by adding Section 9, Congress thereafter made a right of action, which had vested in the party injured, survive in case of his death, for the benefit of the widow or next of kin. In other words, *cases thereafter arising, under the amended Act*, gave to the personal representative for the benefit of the

widow and next of kin, a right of action which did not survive under the Act of 1908.

But there could be but one recovery for the same injury, under Section 9, namely:

1. In case the party injured survived the injury and thereafter died as a result of the injury, the right of action survived to his personal representative for the benefit of the widow and next of kin; or,

2. If death was immediate, instantaneous, no right of action vesting thereby in the party injured, then a right of action became immediately vested in the personal representative of the decedent, under the *death* clause of the act, for the benefit of the widow and next of kin.

The clear purpose and intent of Congress in passing the Survivor Act of 1910 was to thereafter preserve for the benefit of a widow and next of kin, a right of action, which, by the Act of 1908, did not survive.

There has been some considerable conflict by different courts in the several states, in the constructions of the different state statutes, modeled after Lord Campbell's Act, so called. It hardly seems to us necessary, or that any light can be added or given the court by reference thereto, or a prolonged discussion of what might be a proper construction to give to these statutes.

We do not see anything in *Railway vs. Clark*, 152 U. S., 230, or in *Railway vs. Dixon*, 179 U. S., 131, which militates against the construction we have placed on the Federal Act of 1908 or the amendment of 1910.

In *Railway vs. Clark* (*supra*) the statute of Indiana came in review. It is different from the Federal Act under discussion and review here.

In *Railway vs. Dixon (supra)* the constitutional provision and statute of the state of Kentucky came under review and discussion.

These cases are, we think, easily distinguishable from the one at bar.

In further support of our contention that a right of action became vested in Wisemiller at the time of his death, he surviving his injuries, and that thereby no right of action became vested in his representative for the benefit of the widow, we cite a number of authorities:

In *State vs. Grand Trunk R. R.*, 61 Maine, 114, it was held, that to make a railroad company liable to a penalty for killing a man, death must be instantaneous, but if, as here, he lived several hours, was conscious and talked, there was no liability, because the right of action became then vested in him, *and by the survivor terms of the Act,* survived to his personal representative.

In *Sawyer vs. Perry,* 88 Maine, 42, it was held, that an act giving a right of action for injuries causing death "are limited to cases where the person injured dies immediately"; but it was held that "immediate" is not necessarily always "instantaneous." In the case cited, the action was for the benefit of the widow. The petition showed the injured party lived one hour. Demurrer to the petition was sustained *on the ground that a right of action vested in the injured party.*

West vs. Detroit United Ry. Co., 159 Michigan, 269. In the case cited, the man was struck by a street car, breathed for a few minutes, lived for a few minutes, but was dead when taken out from under the car. In that case it was held, that death was "instantaneous," so as to give a right of action under the "Death Act" instead of the "Survival Act."

In *Oliver vs. Street Ry. Co.*, 134 Michigan, the party injured survived in a comatose and unconscious condition until the following day, when he died. It was held, in that case, that death not having been immediate or instantaneous, no action could be brought under the "Death Act," but must be brought under the "Survival Act."

In *Dolson vs. L. S. & M. S. Ry. Co.*, 128 Michigan, 444, it was held, that where a man lived twelve hours after his injury, part of the time conscious and part of the time unconscious, a cause of action became vested in him and survived under the "Survival Act," and not under the "Death Act."

In *Kellow, Admr. vs. Central Iowa Ry. Co.*, 68 Iowa, 470, the party was injured in a wreck, but survived a short time. It was held, that a cause of action became vested in him, and under the "Survival Act," survived to his personal representative. And this, whether he lived a month or a year, the test being whether he survived the injury and not for the duration of the survival. Had death been instantaneous, no action could survive him.

There are other cases which, we think, sustain our contention.

Sweetland vs. R. R. Co., 117 Michigan, 329.
Jones vs. McMillan, 129 Michigan, 86.
Storrie vs. Grand Trunk Elevator Co., 134 Michigan, 297.
Ely vs. Detroit United Ry. Co., 162 Michigan, 287.
Railway vs. Dawson, Adm., 68 Ark., 1.
Nourse, Adm., vs. Packard, 138 Mass., 307.
Mulcahey, Adm. vs. Washburn Car Co., 145 Mass., 281.
Holton vs. Dailey, 106 Ill., 131.

In the case last cited, the learned judge, in delivering the opinion of the court, used this language:

> "It is not to be presumed that it was intended there should be two causes of action in distinct and different right, by the same plaintiff for the same injury. It would be impossible to draw a line severing with accuracy, the damages resulting from the permanent character of the injury, from the actual loss to the wife, parent or child, by reason of the same injury resulting in death."

See also City vs. Marfield, 63 Kas., 794.

In Michigan there is what is called the "Death Act," which is substantially Lord Campbell's Act, and also the "Survival Act." In other words, by these two acts, we have substantially the situation presented by the Federal Act of 1908, with the amendment of 1910 added, the only difference being that in the Federal Act these two classes of action are combined in a single statute.

The two Michigan statutes are as follows:

"Survival Act."

> "(10117) Sec. 5. In addition to the actions which survive by the common law, the following shall also survive; that is to say, actions of replevin, and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, *for negligent injury to persons*, for damage done to real and personal estate, and actions to recover real estate where persons have been induced to part with the same through fraudulent represetnations and deceit.
>
> "(10118) Sec. 6. When any action mentioned in the preceding section shall be prosecuted to judgment against the executor or administrator, the plaintiff shall be entitled to recover only for the value of the goods taken, or for the damage actually sustained, without any vindictive or exemplary damages, or damages for any alleged outrage to the feelings of the injured party."

"Death Act," Substantially Lord Campbell's Act.

"(10427) Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect therefor, then and in every such case the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"(10428) Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered."

As we view it, the whole subject of the right of recovery in cases of this kind is statutory; and a right of action must stand or fall on the construction of that statute. That is to say, if the statute does not in terms confer the right, it does not exist.

It may seem a hardship that where the right of action vested in the person injured by reason of his surviving the injury for a conscious period, that no survivorship was provided for in the Act of 1908; but that does not justify a construction of the statute differing from that which Congress recognized by the amendment of 1910.

It is contended by counsel for defendant in error that this question of survivorship of the right of action, under the Federal Act of 1908, is disposed of in the Employers' Liability Cases, 223 U. S., 1. This is not true.

This claim is based upon the fact that one of the cases presented to the Supreme Court was the Walsh case. In the Walsh case, there were six counts in the declaration. On demurrer, four of the counts were held bad, but the second, which counted on the *death* of the person injured, was held good. The case went to trial on that question and the judgment on that question was affirmed by the ruling in 223 U. S., 1.

There is nothing in the record in the court below or in the Supreme Court holding against us on our point, that in order that there shall be, under the Act of 1908 a vested right of action in the personal representative to recover damages for the benefit of the widow and next of kin, the death of the party injured must be immediate,—instantaneous. And as already pointed out, the question was not raised nor discussed.

II.

The Court Erred in Its Charge to the Jury on the Measure of Damages.

We quote again, for ready and convenient reference, the charge of the court in that regard: "It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and *draw upon your experiences as men,* and *measure as far as you can,* what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, *the care and advice* of Mr. Wisemiller, her husband."

There is nothing in the Federal Court of last resort, that we have been able to find, that will sustain *the double rule* for the measure of damages as was announced by the Circuit Court.

There is some considerable conflict in the decisions of the several states upon this question; that is to say, whether the damages in such cases are limited to the value of the de-

cedent's ability to earn money and therein the probable pecuniary loss in dollars and cents the party sustained; or, in addition, the jury is permitted to go beyond that, as it were into the uncertain and effervescent domain of speculation, and "draw from their experience as men as far as they can" what it would have been reasonably worth to Mrs. Wisemiller in dollars and cents to have had to her, during their life together, had he lived, "the care and advice of Mr. Wisemiller, her husband."

If the jury in assessing damages are permitted to draw from their experiences as men as far as they can, then there is no limitation or boundary of what *might be* the judgment of one jury as opposed to the judgment of another jury on the same state of facts. We would then have a rule for the measure of damages depending not upon the value of the decedent's ability to earn money, in other words, the probable pecuniary loss in dollars and cents, but in addition thereto, what in the experience of the jurors as men would be the probable pecuniary loss estimated in dollars and cents for the loss of "care and advice."

To estimate the damages in dollars and cents from their experience as men as far as they can, might lead the jury to take into consideration loss of companionship, society, association, perhaps mental suffering, grief and despair over the loss of care and advice.

What are the jurors to understand by the term "care and advice?"

Webster's International Dictionary of 1895, gives the following definition and analysis of the word "care":

1. Anxiety; concern; solicitude.

2. Charge; oversight or management, implying responsibility for safety and prosperity.

3. Attention or heed; caution; regard; heedfulness; watchfulness.

4. The object of watchful attention or anxiety.

It is synonymous with anxiety, solicitude, concern, caution, regard, management, direction, oversight. *These words express mental pain in different degrees.* Care belongs primarily to the intellect and becomes painful from overburdened thought; anxiety denotes a disturbing uneasiness from the dread of evil; solicitude expresses the same feeling in a diminished degree; concern implies exercise of anxious thought more or less intense. Quotation is made from Spencer: "Right sorrowfully mourning for her bereaved cares."

Suppose in this case, the question arose in the minds of the jury what was meant by the court in saying "care and advice," and to satisfy the jury as to the extent to which they might go in that regard, they referred to the dictionaries as to what was meant by the term "care and advice." They would have found that it meant concern, anxiety, solicitude, noting some degree of pain in the mind, apprehension of evil, protection, charge, oversight implying concern for safety and prosperity, the object of care, watchful regard and attention; that it was synonymous with the quotation we have already given of the definition and meaning of "care."

The statute in providing recovery for pecuniary loss, that is, money loss, is not to be so construed that in estimating such pecuniary loss, the jury were to take into account anything beyond the value to the beneficiary of the decedent's ability to earn money and the share that the beneficiary would in all reasonable probability have received from the decedent, had he lived.

The rule as to the measure of damages in cases founded on statutes similar to the one at bar, and as sustained by the weight of authority, is as follows, viz: *The value of the decedent's ability to earn money.*

In *Davis vs. Guarnieri,* 45 Ohio State, 471, the Supreme Court of Ohio approved without dissent the following as the correct rule in the measure of damages in death cases:

"In this case the plaintiff's damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of Angela Guarnieri. In no case can the jury, in estimating the damages, consider the bereavement, mental anguish or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased, had she lived, is a proper subject for the consideration of the jury if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman in a pecuniary point of view, is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money, for the loss of the services of this woman, that you are to find, if you find a loss. It is that same which put in money is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death, if she had not died from taking this drug."

This ruling was the one given to the jury in the trial court. Connsel for the plaintiff in error took exceptions to that part of the charge that the jury in estimating damages were to take into account "the loss of the services of this woman" for the reason that "services to the family" included not only financial aid, but companionship to the husband and children, instruction by way of culture, moral training and other elements of like character which are not within the rule of pecuniary compensation."

The court in answering this exception, *state that this instruction is not open to the objection claimed by the counsel for plaintiff in error.* The court further says the charge, as quoted, is "a sound, clear and considerate statement of the true rule of damages applicable to the case."

In *Steel, Adm. vs. Kurtz. et al.*, 28 Ohio State, 191, the court states the rule as follows:

"The jury in assessing damages are limited to giving pecuniary compensation for injuries resulting to the beneficiaries on account of the death of the deceased. No damages can be given on account of bereavement, mental suffering or as a solace on account of such death."

The court also held that:

"The amount of damages are to be ascertained by the jury *from the proofs in the case* and are to be a fair and just compensation for next of kin with reference to the *pecuniary injury* resulting to the beneficiary from such death."

In the case at bar, there is an utter absence of any proof whatever on the subject of "care and advice" given by the husband to his wife. This rule, par. 3, in the case last cited, is approved in 45 O. S. (*supra*), p. 481 of the opinion of the court.

In *Ry. vs. Allmeier, Adm.*, 60 O. S., 10, the learned judge in announcing the opinion of the court uses this language (at top of page 15):

"Similarly it (the damages) must be determined by the jury from the evidence and not merely by guess. Such facts should be established in the case by evidence as will enable the jury to fix the amount of the pecuniary loss * * * and the jury should confine the verdict to the amount of loss so proven."

In further support of this necessity of proof, we cite the following cases:

Ry. vs. Austin, Adm., 68 Ill., 126.
Ry. vs. Townsend, 69 Ark., 580.
Hay vs. R. R., 62 N. J. L., 63.
Holum vs. R. R., 140 Michigan, 582.
Swift & Co. vs. Johnson, 138 Fed. Rep., 867.

In *Weller vs. R. R.* (*supra*), 111 Michigan, 518, the court held as follows:

"It is error to allow the jury to consider damages sustained by decedent's children from loss of culture and moral and physical training received from the father, of the value of which there was no evidence."

On the question as to what is the true rule on the measure of damages we cite further the following cases:

McHugh vs. Schlosser, 159 Penn. State, 480.
Holton vs. Dailey, Adm., 106 Ill., 132.

In *Ry. Co. vs. Golway*, 6 D. C. App., 144, the court in passing upon the question of damages uses the following language (at top of page 177):

> "It is generally conceded that damages under such statutes must be pecuniary. Now the *advice and counsel* of a good and sensible father might be of inestimable value to a son of even mature years, but we cannot see how an assessment of *pecuniary damages can* be founded thereon. It is too remote, vague and uncertain."

See also R. R. vs. Johnson, 78 Texas, 536.

In *R. R. vs. Bentz*, 108 Tenn., 670, the third paragraph of the syllabus is as follows:

> "It is reversible error for the court in such cases to instruct the jury that they may consider *loss of advice, counsel, comfort and enjoyment* resulting from her husband's death, as elements of damages."

The following cases are further cited in support of the rule as claimed by use as to the measure of damages:

Sternfelds vs. Ry., 73 N. Y. App. Div., 494.
Gas Co. vs. Rogers, 135 S. W., 904.
R. R. vs. Walker, 125 S. W., 99.
R. R. vs. Wilson, 48 Fed. Rep., 57.

The learned judge, in his charge to the jury (par. 80, page 48, Printed Record), gave the following as the rule on the measure of damages, namely:

> "You are to consider, as far as the evidence enlightens you, what her probable share of such earnings would have been, for that, and that alone, of course, constitutes her financial interest in his earnings."
>
> Then, "In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by

> Mr. Wisemiller and Mrs. Wisemiller, the relation of husband and wife, and draw from your experience as men, and measure as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents, to have had during their lives together, had he lived, *the care and advice* of Mr. Wisemiller, her husband."

In paragraph 78, top of page 48, Printed Record, the court had said: "In no wise are you authorized in this case to award her damages by way of *balm to her feelings;* that consideration should be dropped out of the case absolutely." This, we submit, did not cure the error complained of, if one existed.

The jury returned a verdict in favor of the plaintiff for $12,000; and for which amount, with interest and costs, judgment was rendered in favor of the plaintiff. We do not think it inappropriate to state that Mrs. Wisemiller survived the rendition of the judgment but a short time. She was "the only heir of her husband," no children surviving him (page 39, Printed Record).

We respectfully submit that the motion of the defendant in error to dismiss the action or confirm the judgment should not be granted; but on the contrary, upon a final hearing, the judgment should be reversed and judgment rendered in favor of plaintiff in error; or, the judgment reversed and a new trial granted.

Respectfully,

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HENRY RUSSEL,
EMERY D. POTTER,
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Counsel.

(22,561.)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

No. 242.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

DANIEL B. VREELAND, *Administrator of the Estate of Albert Wisemiller, Deceased,*
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON HIS MOTION TO DISMISS OR AFFIRM.

This case is now before the court on a Motion by the defendant in error to Dismiss or Affirm. From the trial court, the Circuit Court of the United States for the Northern District of Ohio, Western Division, writ of error was prosecuted to this court; the alleged errors are largely constitutional.

STATEMENT OF THE CASE.

This action was begun in the Circuit Court of the United States for the Northern District of Ohio, Western

Division, on February 5, 1910, by Daniel B. Vreeland, as administrator of the Estate of Albert Wisemiller to recover of The Michigan Central Railroad Company, damages for the benefit of the widow of said Wisemiller for his death due to a collision October 5, 1909, while he was acting as a locomotive engineer of an interstate freight train operated by said railroad. The plaintiff bases his right of action on the act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, as amended by an act, approved April 5, 1910. Trial by jury was held October 6-7, 1910; verdict for plaintiff in the sum of $12,000.00. Motion for new trial overruled; writ of error sued out January 28, 1911.

THE ASSIGNMENT OF ERROR.

The Assignments of Error, sixteen in number, will be found at page 54 et seq. of the Record. These divide themselves broadly into two classes: (a) those involving the constitutionality of an Act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, as amended April 5, 1910,—being the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth,—eleven in all; and (b) certain minor alleged errors, being the first, second, third, fifteenth and sixteenth. All of the assignments of error in the first class, being constitutional, have heretofore (January 15, 1912) been disposed of by this court (Employers' Liability Cases, 223 U. S. 1). Those in the second class are either too broad to receive consideration, being inserted out of abundant caution, as the first and sixteenth (complaining in general terms because the trial judge refused to direct a verdict for the defendant, or alleging that no right of action survived assignment two, a question heretofore determined adversely to contention of plaintiff in error in Employers' Lia-

bility Cases, 223 U. S. 1, or alleged error in charging on the measure of damages (fifteenth assignment).

OUTLINE OF ARGUMENT.

In view of certain admissions by the defendant at the trial hereof, the jurisdiction of this court herein is, to say the least, very doubtful. But, conceding for present purposes that this court has jurisdiction, it appears that all the material questions are constitutional and that since the writ of error was sued out these have each been determined by this court adversely to the contentions of the plaintiff in error; as a result the case is now clearly without merit and is pending for the purpose of delay only. Under such circumstances a Motion to Dismiss or Affirm is proper and will be granted.

ARGUMENT.

I.

A Motion to Dismiss or Affirm under the circumstances herein is proper and should be granted.

As will appear later (post, Point II) this court has by reason of the admissions of counsel for the Michigan Central Railroad Company no jurisdiction of the pending case. Under such circumstances a Motion to Dismiss is proper.

Hilton v. Dickinson, 108 U. S. 165.
United States v. Burchard, 125 U. S. 178.
Carter v. American and Ocean Insurance Co., 2 Pet. 554.

By virtue of the admissions of counsel, to-wit: that the only question remaining was the measure of damages, it is doubtful if error could then lie to this court. (Rec. 46, 47.)

As will also appear later (post, Point III) all of the material questions raised by the Assignment of Error have been decided pending hearing hereof by this court adversely

to the contentions of the plaintiff in error. Under such circumstances a Motion to Affirm is proper (Rules of Court 6).

Where, as here, the jurisdiction of this court is doubtful and the appeal is pending for delay, or is or becomes frivilous, a Motion to Dismiss or Affirm is proper.

N. Y. & N. E. R. Co. v. Bristol, 151 U. S. 555.
Sou. R. Co. v. Carson, 194 U. S. 136.

II.

Certain admissions at the trial preclude this court from having jurisdiction hereof; certainly, the jurisdiction is doubtful.

During the trial, two of the counsel for the defendant railroad (Messrs. Potter and Robson) admitted, after the submission of all the evidence, that the only remaining question was the amount of the damages. These admissions are to be found at page 46-47 of the Record:

At the close of the evidence, which had shown that the deceased came to his death through the negligence of persons in the employ of the defendant, the following colloquy took place:

> Mr. Thatcher: At this point, if Your Honor please, I am of the opinion that the plaintiff should, and he does, now make a motion to direct this jury to return a verdict for the plaintiff, and the only thing we need to argue will be the amount of the damages.
>
> The Court: That thought was in my mind when the defense rested. Is there any controversy upon any question, as the court views the case, except the question of the amount of damages? Are not the facts all conceded? Is there any other question here?
>
> Mr. Potter: We think that is true, if Your Honor please.

Later, when counsel for the plaintiff felt it necessary to interrup counsel for the railroad in his argument to the jury

and direct attention to the character of the argument being made the following was said:

> The Court: The only question in the court's mind is the question of recovery. * * * It seems to the court that the undisputed facts of this case impute liability to the company under this act. There is no evidence h[illegible]at the company independent of the acts of its subordinates, was negligent, but the company suffers through the occurrence of an act of this character which could not possibly arise unless some one under the company was at fault. This is all there is to it. We all agree on that.
>
> Mr. Robson: I have no desire to depart from that, and I do not believe that I was doing that, if Your Honor please.

As stated, with the one question of measure of damages remaining the jurisdiction of this court is, to say the least, doubtful.

III.

All the material questions involve the constitutionality of the Employers' Liability Act, and have heretofore been determined adversely to the contentions of the plaintiff in error.

The Assignments of Error are, with the exception of the four mentioned, predicated on the unconstitutionality of the act under which the plaintiff relied (An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases, approved April 22, 1908, as amended by Act of April 5, 1910). These acts were held constitutional in Mondou v. N. Y., N. H. & H. R. R. Co.; N. P. R. Co. v. Bessie Babcock, Administratrix; N. Y., N. H. & H. R. Co. v. Mary Agnes Walsh, Administratrix, and Mary Agnes Walsh, Administratrix, v. N. Y., N. H. & H. R. Co., *sub nom.* Employers' Liability cases, 223 U. S. 1, decided January 15, 1912.

IV.

The other and minor questions are without merit.

As pointed out heretofore the Assignments of Error other than those involving the constitutional questions involve (a) an instruction to the jury concerning the measure of damages, (b) the survival of the right of action, and (c) the refusal of the court to direct a verdict for the defendant. These assignments of error (first, second, third, fifteenth and sixteenth) are stated too broadly and without precision. Further, each of the questions is well settled.

(a) The more important concerns the instruction relating to the measure of damages. The fifteenth assignment of error (Record p. 46) reads:

> The Court erred in its charge to the jury on the measure of damages in this to-wit:
>
> "It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experience as men, and measure as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

In view of the well settled law, this assignment is without merit. (N. P. Ry Co. v. Freeman, 83 Fed. 82 (overruled on question of contributory negligence); Felt v. Puget Sound Electric Railway Co., 175 Fed. 477; Bollinger, Adm., v. St. P. & Duluth R. R. Co., 36 Minn. 418; Chattanooga R., etc., Co., vs. Clowdis (Ga.), 17 S. E. Rep. 88; Mo. Pac. R. R. Co. v. Bond, 2 Tex. Civ. App., 104; Tilley v. H. R. R. R Co., 29 N. Y. 252; St. L., etc., R. Co. v. Maddry, 57 Ark. 306; Stoner v. St. L., I. M. & S. R. Co., 91 Mo. 509; Walker v. McNeill, 17 Wash. 582), and especially so, when modified as it was by another instruction, to be found at p. 47 of the Record, reading:

"You will observe at the outset that you are not to take into consideration for any purpose here the fact that this lady, if that be the fact, (and we may assume that it is a fact, from our common observation of life) suffered anguish and sorrow as a result of the loss of her companion. In no wise are you authorized in this case to award her damages by way of balm to her feelings; that consideration should be dropped out of the case absolutely."

(b) That the right of action survived was determined in Employers' Liability Cases, 223 U. S. 1.

(c) The refusal of the court to direct a verdict for defendant (first and sixteenth assignments). These two assignments of error depend absolutely on the other assignments and have no independent force.

In conclusion, it is respectfully submitted that, in view of the admissions at the trial by counsel for the defendant railroad the only remaining question was the amount of damages, this court is without jurisdiction hereof, and that the Motion to Dismiss should be granted.

And, further, that conceding for present purposes the jurisdiction of the court, as all the questions between the parties have since writ of error sued out been determined by this court, the case now remains in this court for purposes of delay only, and that the Motion to Affirm should be allowed.

Respectfully submitted,

JOHN B. DAISH,
Attorney for Defendant in Error.

Washington, September , 1912.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 242.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant in error, by his counsel appearing in that behalf, and moves the court to dismiss the writ of error herein for the reason that there can now be no actual controversy involving the real and substantial rights between the parties to the record, as since the writ of error herein was sued out all material questions raised therein have been passed upon by this court and determined adversely to the contention of the plaintiff in error; and further for the reason that by virtue of the said determination of this court said writ of error is without merit; and further for the reason that by virtue of said determination of this court the said writ of error and proceedings thereunder remain only for the purposes of delay.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment of the United States Circuit Court for the Northern District of Ohio, Western Division, from which court said writ of error was sued out, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that since the suing out of said writ of error, decisions and determinations of this court now clearly govern the pending case, and the question on which the jurisdiction of this court depends is now so frivolous as not to need further argument, and this case is now pending in this court for delay only.

JOHN B. DAISH,
Attorney for Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, Defendant in Error.

WASHINGTON, *October* 5, 1912.

WASHINGTON, *October* 5, 1912.

To Messrs. F. E. Robeson (Detroit, Mich.) and E. D. Potter (Toledo, Ohio) and Potter and Potter (Toledo, Ohio), Counsel for The Michigan Central Railroad Company, Plaintiff in Error:

Please take notice that on the 4th day of November, A. D. 1912, or as soon thereafter as counsel can be heard, a motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief or argument in support of said motion.

JOHN B. DAISH,
Attorney for Daniel B. Vreeland, Defendant in Error, for the Purposes of this Motion.

Service of the foregoing motion to dismiss or affirm and the annexed brief or argument acknowledged this 7th day of October, 1912.

Frank E. Robson.....,

Emery D. Potter.....,

Potter & Potter.....,

Counsel for The Michigan Central Railroad Company, Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 242.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT ON THE MERITS.

The plaintiff in error has filed no brief or printed argument on the merits as required by the Rules of Court; counsel for defendant in error are therefore not advised of the points of law and fact relied upon by plaintiff in error. This brief is submitted for the convenience of the court if, notwithstanding default of the plaintiff in error in this behalf, the Court shall desire to consider the assignments of error appearing in the Record herein.

On motion of defendant in error to dismiss or affirm and briefs by both parties thereon the court ordered this case to be transferred to the summary docket; the case is therefore

pending on the merits on writ of error sued out of the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Statement of the Case.

The original action was brought by Daniel B. Vreeland, administrator of the estate of Albert Wisemiller, deceased, on February 5, 1910, against the defendant below, The Michigan Central Railroad Company, to recover damages on behalf of the widow of Wisemiller, because of his death by wrongful act in a railroad collision while he was working as a locomotive engineer for the railroad company in Michigan.

Some statements in the brief of defendant in error on motion to dismiss or affirm might lead the court to think that the suit was grounded solely on what is commonly called the Federal Employers' Liability Act (35 Stat. L., 65, ch. 149, as amended, 36 Stat. L., 291, ch. 143). Plaintiff's petition (Rec., p. 2) recited facts which show that the death of the decedent arose while he was working for the defendant, engaged in interstate commerce; but it also shows that a right of action existed in favor of the plaintiff by reason of statutes of the State of Michigan, which give such right, whenever a common carrier by railroad through the negligence of any of its officers, agents or employees causes the death of an employee (Rec., p. 40).

From the record it appears that Albert Wisemiller was working on the Bay City division of The Michigan Central Railroad Company on October 5, 1909; he was operating as engineer a locomotive drawing a *regular* freight train, No. 215, in a northerly direction and had orders to bring the same to a stop at a station called Carpenter. These orders also directed a southbound *extra* freight train, No. 8101, to meet Wisemiller's train at Carpenter (Rec., p. 19). Plaintiff below called as his first witness D. C. Sutherland, division superintendent of the defendant carrier, who testified (Rec., p. 10 *et seq.*) that under the train order in question (Ex-

hibit 2, Rec., p. 19) it was the duty of Wisemiller to bring his train to a stop at the station (Carpenter), and that since Wisemiller was operating a *regular* train he had the right, under the rules of the company, to occupy the main track at the station; the southbound train, being an *extra*, it was the duty of the persons operating it to stop at the switch and pull in on the side track and thus pull by Wisemiller's train. The evidence is undisputed that instead of the southbound train taking the siding (as it should) those in charge of it did not slacken speed, but kept the main track and thus recklessly caused it to collide with Wisemiller's engine, shortly after it had come to a stop on the main track. A graphic description of the collision is given by the witness Kearsly (Rec., p. 33 *et seq.*); he says that he was a brakeman on Wisemiller's train, and when the same come to a stop Wisemiller ordered him to run ahead and open the switch for the southbound train; that he had succeeded in getting about seven car lengths north of his train when he saw the southbound train had not stopped at the switch and he attempted to swing it down; that the southbound train did not stop but collided with Wisemiller's engine. The evidence shows, and it is admitted by the answer of the defendant, that Wisemiller received in the collision injuries which resulted in his death about three hours thereafter. There is not a scintilla of evidence indicating any negligence on the part of Wisemiller.

At the conclusion of the testimony, the facts being undisputed, it was conceded by counsel for the defendant railroad company, that the only question to be submitted to the jury was the amount of damages to which plaintiff might be entitled (Rec., pp. 46, 47). Notwithstanding this admission, error was prosecuted to this court, the right thereto being based on the claim that the Federal Employers' Liability Act is unconstitutional. All questions of the constitutionality of this act have been set at rest, pending the hearing of this case, by decision of this court: Employers' Liability cases, 223 U. S., 1, decided January 15, last. In

spite of the determination of these questions adversely to the contentions of the plaintiff in error pending hearing by this court, it is now sought to have this court pass upon other and minor questions—questions which in and of themselves would not be cognizable by this court.

For convenience the Federal Employers' Liability Act is printed in the Appendix hereof.

The Assignments of Error.

The assignments of error, sixteen in number, will be found at page 54 *et seq.* of the record. These divide themselves broadly into two classes: (*a*) Those involving the constitutionality of an act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, as amended April 5, 1910—being the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth—eleven in all; and (*b*) certain minor alleged errors, being the first, second, third, fifteenth and sixteenth. All of the assignments of error in the first class, being constitutional, have heretofore (January 15, 1912) been disposed of by this court (Employers' Liability cases, 223 U. S., 1). Those in the second class are either too broad to receive consideration, apparently being inserted out of abundant caution, as the first, third, and sixteenth (complaining in general terms because the trial judge refused to direct a verdict for the defendant), or alleging that no right of action survived (assignment two)—a question heretofore determined adversely to contention of plaintiff in error in Employers' Liability cases (223 U. S., 1), or alleged error in charging on the measure of damages (fifteenth assignment)

Outline of Argument.

The plaintiff in error having at the trial abandoned all questions of constitutionality of the statute and having continued so to do in its brief on defendant's motion to dismiss or affirm and the determination by this court pending hearing herein of all constitutional questions sought to be raised, this court has no jurisdiction on the direct appeal from the circuit court to determine questions not within the provisions of section 238 of the Judicial Code (act March 3, 1911). To secure a review of such questions error should have been prosecuted to the Circuit Court of Appeals.

Assuming, but not conceding, that this court has jurisdiction of these non-constitutional and minor questions, they are clearly without merit.

ARGUMENT.

On their face the assignments of error raise but two questions:

1. The constitutionality of the Federal Employers' Liability Act;

2. Minor questions—the interpretation of the said act, and the propriety of the charge to the jury.

I.

The constitutional questions were abandoned by the defendant below at the trial of the case, have since been abandoned in its brief on the motion to dismiss or affirm, and pending hearing of the case have been decided adversely to the contentions of the railroad company.

(a) The constitutional questions were abandoned by the railroad company at the trial.

At the close of the evidence (Rec., pp. 46, 47), which had shown that the deceased came to his death through the negligence of persons in the employ of the defendant, the following colloquy took place:

> "Mr. THATCHER: At this point, if your honor please, I am of the opinion that the plaintiff should, and he does, now make a motion to direct this jury to return a verdict for the plaintiff, and the only thing we need to argue will be the amount of damages.
>
> "The COURT: That thought was in my mind when the defense rested. Is there any controversy upon any question, as the court views the case, except the question of the amount of damages? Are not the facts all conceded? Is there any other question here?
>
> "Mr. PORTER: We think that is true, if your honor please."

Later, when counsel for the plaintiff felt it necessary to interrupt counsel for the railroad in his argument to the jury and direct attention to the character of the argument being made, the following was said (Rec., p. 47):

> "The Court: The only question in the court's mind is the question of the amount of recovery. * * * It seems to the court that the undisputed facts of this case impute liability to the company under this act. There is no evidence here that the company, independent of the acts of its subordinates, was negligent, but the company suffers through the occurrence of an act of this character, which could not possibly arise unless some one under the company was at fault. That is all there is to it. We all agree on that.
>
> "Mr. Rosson: I have no desire to depart from that, and I do not believe that I was doing that, if your honor please."

As a result of such admissions by two of the railroad's attorneys these constitutional questions could not properly, it is submitted, be thereafter raised.

(b) The brief of the railroad company on the motion to dismiss or affirm admits that pending hearing herein this court has settled the constitutionality of the Employers' Liability Act and abandons any rights (if rights it had on such grounds) under the act.

(c) Whether or not the railroad company abandoned at the trial and in this court its contentions on constitutional grounds, such contentions have heretofore been denied by the decision in Employers' Liability cases, 223 U. S., 1. *There is nothing in this case by which it can be differentiated from the cases there decided.*

It is proper to say that at the time error was sued out in this case (March 6, 1911) this court had not passed upon the amended Employers' Liability Act; there is no question

here of good faith in prosecuting error; the question in this behalf is solely on the right to have error, having abandoned the only defense for which error to this court was sought and would lie. We respectfully submit that having abandoned a defense, one cannot thereafter rely upon it.

But, admitting for the purpose of this argument, and for the purpose of the argument only, that the railroad company did not at the trial abandon its defense on the constitutional points, or, if it did, that it could thereafter rely on them, the question of the jurisdiction of this court arises. The constitutional questions being properly raised, error lies to this court under the provision of section 238 Judicial Code,—providing error "in any case in which the constitutionality of any law of the United States * * * is drawn in question." What is before the court under such circumstances is well known; but here, on the hypothesis above stated, there is not now (nor has there been since January 15, 1912) any right to writ of error on constitutional objections to the statute. The only reason by which this court could entertain jurisdiction has been dispelled. It is therefore submitted that the cause for invoking the jurisdiction of this court herein, to wit, the constitutional objections, having failed (even if not abandoned), there is removed from consideration by this court the minor questions, to wit: Interpretation of the statute and propriety of charge to the jury. Error for such last mentioned questions lies to the Circuit Court of Appeals (Judicial Code, sec. 128).

II.

Assuming that all the questions raised by the Assignments of Error are properly before and can be considered by this court, they will be found upon examination to be without merit.

The principal question (assuming that it still exists herein, in spite of the abandonment of it) has been answered heretofore by this court. The minor questions are two in

number: (1) the proper interpretation of the statute as to whether or not, if death be not instantaneous, a right of action for the benefit of the widow survives, and (2) the propriety of the charge to the jury. As before stated both of these questions are properly cognizable by the Circuit Court of Appeals; if they be here for consideration, it is submitted they were properly answered by the decisions of the learned judge below, particularly in his opinion on motion for new trial (Rec., p. 14.)

(1) The first of these minor questions concerns the interpretation of the statute. The second and third assignments of error taken together would have this court hold that, as the injured engineer lived after the accident three hours, no right of action survived. To so hold, this court is called upon to read into the statute provisions not now in it. The act (sec. 1) makes common carriers by railroad, engaged in interstate commerce,

> "Liable in damages to any person suffering injury while he is employed by such carrier in such commerce,
>
> "or, in case of death of such employee, to his or her personal representative, for the benefit," etc.

And section 9 provides—

> "that any right of action given by this act to a person suffering injury shall survive to his or her personal representative."

The effect of the statute with respect to the former rule relating to survivorship was thus stated by this court in Employers' Liability cases, 223 U. S., 1, 50:

> "The rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives."

Aside from this statement, the clearness of the language of the act is apparent, and no doubt whatever can be predicated concerning the meaning thereof.

The situation in this behalf may be befogged, however, if the decisions on other statutes having the same or similar objects, but differing in language, be said to be applicable here. As showing what, we submit, was the clear intent of Congress, it is advisable to refer briefly to the history of previous legislation.

> "The unsatisfactory state of the common law, which denied any right to recover for death due to negligence or wrongful act, led to the passage of statutes giving a right of recovery in such cases. The English act of 1846 (9 & 10 Vict. C., 93), commonly designated as 'Lord Campbell's Act,' so often referred to, has served as a model upon which most of the statutes of the various States of the Union have been enacted. Statutes of this general character do not merely remove the operation of the maxim *'Actio personalis moritur cum persona,'* but give a new cause of action. The object of all statutes passed in conformity with the general purpose of the Lord Campbell Act is to provide the means for recovering the damages caused by that which is in its nature a tort. The death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death." Peers *vs.* Nev. Power, etc., Co., 119 Fed., 401.

Unless the provisions of the particular statutes are distinctly and clearly to the contrary, it is the rule of the Federal and many State courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous.

Roach *vs.* Imperial Min. Co., 7 Fed., 698.

Roach *vs.* Cons. Imp. M. Co., 7 Sawy. (U. S.), 224, construing Nevada law.

Matz *vs.* Chicago, etc., R. Co., 85 Fed., 180, construing Missouri law.

Sternenberg *vs.* Mailhos (C. C. A.), 99 Fed., 43, construing Texas law.
St. Louis, etc., R. Co. *vs.* Dawson, 68 Ark., 1.
Murphy *vs.* N. Y., etc., R. Co., 38 Conn., 184.
Mallot *vs.* Shimer, 153 Ind., 35, construing Illinois law.
Conners *vs.* Burlington, etc., R. Co., 71 Iowa, 490.
Warden *vs.* Humeston, etc., R. Co., 72 Iowa, 201.
Brown *vs.* Buffalo, etc., R. Co., 22 N. Y., 191.
Perham *vs.* Portland Elec. Co., 33 Ore., 451.
Internat'l, etc., R. Co. *vs.* Kindred, 57 Tex., 491.
Boyden *vs.* Fetchbury, etc., R. Co., 70 Vt., 125.
Van Amberg *vs.* Vicksburg, etc., R. Co., 37 La. Ann., 651.
Hamilton *vs.* Morgan's L., etc., R. Co., 42 La. Ann., 824.
Legg *vs.* Britton, 64 Vt., 652.

Of course, where States have so-called "survival acts" and a statute creating a new cause of action (as in Michigan) it would appear to be a salutary rule that an administrator can recover damages under the latter statute only if death is instantaneous, and if the death is not instantaneous he can recover under the former statute. Sweetland *vs.* Chicago, etc., R. Co., 117 Mich., 329; Dolson *vs.* Lake Shore, etc., R. Co., 128 Mich., 444; Kyes *vs.* Valley Telephone Co., 132 Mich., 281; Oliver *vs.* Houghton Co. S. R. Co., 134 Mich., 367. Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (Sawyer *vs.* Perry, 88 Me., 42). In truth, the rule in Michigan and Maine seems to be and justifiably is (by reason of the language of the acts) at variance with the rule elsewhere.

We submit that the reasoning of Mr. Justice Brewer, construing the Kansas Civ. Code, is sound:

> "Section 422 gives a new right of action—one not existing before; an action which is founded on survivorship; an action which takes no account of the

> wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing."
>
> Hulbert *vs.* Topeka, 34 Fed., 410.

To read into this act (and it is necessary so to do to sustain the propositions in the second and third assignments of error) the word "instantaneous" or "immediate" death would, we submit, change the plain and unambiguous words of the statute and nullify the beneficent purposes for which it was enacted by the Congress.

(2) The fifteenth assignment of error concerns the charge and alleges error in that the court instructed the jury that in assessing the pecuniary damages which the widow may have sustained that:

> "It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experience as men, and measure as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband" (Rec., p. 56.)

With respect to a charge it is submitted that it is proper to consider the entire charge (Baltimore, etc., R. Co. *vs.* Mackey, 157 U. S., 72); the entire charge appears at p. 47 *et seq.* of the record. "Sentences may, it is true" said Strong, J., in Evanston *vs.* Gunn, 99 U. S., 660, "be extracted from a charge, which, if read apart from their connection, need qualification. But the qualifications were given in the context and the jury could not have been misled." And Mr. Justice Davis, in U. S. *vs.* Conklin, 1 Wall.,

644, 654, appreciated that plausible argument might be made on stray words in a charge, but unless calculated to mislead they are harmless.

> "A nice criticism of words will not be indulged where the meaning of the instruction is plain and obvious and cannot mislead them" (the jury).

It is not now contended that it would have been proper for the trial judge to have instructed the jury that in awarding damages it might have considered grief and other elements of like character. In truth, the court was very careful to exclude everything but the pecuniary loss which the widow had sustained. However, it is as yet an open question whether or not the plaintiff, in a case for death by wrongful act under the Federal statute, may not recover for the grief and other like elements of damage which the next of kin suffer in such a case. It will be noted that the Federal statute makes no reference whatever to "pecuniary" loss. The statute says that the defendant "shall be liable in damages * * * for such injury or death," thus permitting damages of whatever kind or nature sustained by him or her for whose benefit the statute was enacted. The case of Steel, Adm., *vs.* Kurtz *et al.* 28 Ohio St., 191, is not applicable here for it holds nothing more nor less than that the jury should be limited to the "pecuniary" loss which is sustained; the court, however, takes care to point out the fact that this is the rule in Ohio, because the Ohio statute limits the damages to "pecuniary" loss; the court also says that such is the prevailing rule, under like statutes, both in England and America.

Conceding, for the purpose of argument, that under the Federal Employers' Liability Act the widow can sue for pecuniary loss only, the question to be determined is what constitutes pecuniary loss. We know of no well-considered case in which the pecuniary loss is limited only to the earning capacity of the decedent. If this were the rule of law, then the widow of a man who may have retired from active

business would suffer no damages whatever by reason of his death by wrongful act. Such a ruling would do violence to the intent and purpose of Congress in enacting the statute. One of the leading cases in the Federal courts is N. Pac. R. Co. *vs.* Freeman, 83 Fed., 82. The second paragraph of the syllabus is as follows:

> "The court charged that, in fixing the damages, the jury might take into consideration deceased's ability to earn money, to support, maintain, care for and protect his wife and children, and to educate and train the latter and the loss to the wife and children because of being deprived of the use and comfort of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs, etc., Held, that this was not calculated to mislead the jury into the belief that they might give damages for a loss of society in the sentimental sense, it being clear that the court intended a loss of society in the material and pecuniary sense."

Error was prosecuted in this case to this court, where the same was reversed (174 U. S., 379), on the sole ground that the decedent was guilty of contributory negligence.

Also see Felt *vs.* Puget Sound Elec. Ry. Co., 175 Fed., 477. The second paragraph of the syllabus is as follows:

> "While loss of decedent's society, protection and guidance is an element of damage in an action for wrongful death, it is only the pecuniary, and not the sentimental, value thereof for which recovery may be had."

In the case of Bollinger *vs.* St. P. & Duluth R. R. Co., 35 Minn., 418, brought to recover for death by wrongful act, on behalf of a widow and children, the court used the following language:

> "The jury, in such cases, may consider prospective advantages of a pecuniary nature, which have been cut off by the premature death (in this case) of the husband and father. The value of the services of

the head of a family in a pecuniary sense cannot be limited to the amount of his daily wages, earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well and the jury must judge of the circumstances of each case. In such cases damages for mere loss of society or mental suffering are not to be included."

Also see—

Chattanooga R., etc., Co. *vs.* Clowdis (Ga.), 17 S. E. Rep., 88.

Mo. Pac. R. Co., *vs.* Bond, 2 Tex. Civ. App., 104.

Numerous cases have held that where a father or mother has been removed by an act of negligence, leaving children. the jury may consider as an element of pecuniary loss the fact that the beneficiaries have been deprived of the care, nurture, and guidance of a parent. The following are some of the cases holding this doctrine. Tilley *vs.* P. R. R. Co., 29 New York, 252; St. Louis, etc., R. Co. *vs.* Haddry, 57 Ark., 306; Stoher *vs.* St. L., I. M. & S. Ry. Co., 91 Mo., 509; Walker *vs.* McNiell, 17 Wash., 582.

It is quite apparent that if the care and guidance and advice of the father is of pecuniary value to the children, likewise is the care and advice of the husband of value to his wife.

It is a matter of common knowledge that when a woman is left to care for herself and manage her own financial affairs, that she is frequently the victim of unscrupulous persons, who take advantage of her position. If the same woman were to have the care and advice of her husband she would not only be shielded from the liability of falling a victim to the schemes of the designing, but, in fact, would seldom be approached by those who seek to defraud. In addition, the care and advice—maintenance, management, oversight, supervision, surveillance, and watchfulness—of the husband is of value to the wife in that it enables her to

invest that which she may have to the best advantage and thereby be of financial profit.

It will be noticed that in the instruction of the court in the case at bar the jury were not told that they could give damages for the grief which the widow had suffered but could only consider "what it could have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

By referring to the charge of the court, bottom of page 47, it will be noticed that the court expressly told the jury that the damages must be limited to the pecuniary or financial loss which the widow had sustained. The court also said:

> "You will observe at the outset that you are not to take into consideration for any purpose here the fact that this lady, if that be a fact (and we may assume that it is the fact, from our common observation of life), suffered anguish and sorrow as a result of the loss of her companion. In no wise are you authorized in this case to award her damages by way of a balm to her feelings; that consideration should be dropped out of the case absolutely."

Further, it is apparent that the jury were not mislead, for they did not give Mrs. Wisemiller any more than the actual loss sustained by being deprived of the income which she was accustomed to receive from her husband during his life. Even if the charge were erroneous, which we by no means concede, it was harmless.

The undisputed evidence to which we have referred shows that the widow was accumulating an average of $600 per year and that her husband's earnings averaged about $1,650 per year. If we deduct from this amount $550 as his probable expenses, we find that the widow was receiving a benefit of approximately $1,100 per year.

The decedent's expectation of life was 24.46 years.

According to annuity tables, to secure an income of $1,100

per year, to a person aged 45 years, it is necessary to multiply that sum by 11.428, which would make $12,578.80 as the sum required to purchase the annuity named.

Thus it is clear that the jury awarding a verdict of $12,000 did not add anything above the actual amount necessary to purchase the income which the widow was then receiving.

This view was entertained by the trial judge, as appears from his opinion on the motion for new trial (Rec., pp. 14, 16) in which he says:

> "In fact, the amount of the award measures so closely to what might be said to be proper, having regard only to his earning capacity, that one might almost say that the jury had not given any consideration to that portion of the court's charge wherein they were given leave to include as a measure of damages their estimation of the value of the care and advice of the husband to the wife" (p. 16).

It is unnecessary to call attention to the numerous cases in which the courts have sustained verdicts far in excess of the amount returned in the case at bar, and in many instances where the evidence failed to show as great earning capacity as the decedent, Wisemiller.

The cases cited as authority to sustain the point that it is improper for the court to instruct the jury that they may consider the pecuniary value of the care and advice of a husband in fixing the amount of damages to be awarded to his widow do not maintain that contention.

In Sternfels vs Met. Street Ry. Co., 73 N. Y. App. Div., 494, the court held that the father owed to his children the duty of nurture and intellectual, moral and physical training, and of such instruction as can only proceed from a parent. Testimony which bore upon the care and attention which the deceased devoted to his family was held to be properly admitted.

In Railroad Co. *vs.* Wilson, 48 Fed., 57, the error committed was in allowing the jury to assess damages for the loss of society.

The case of Railroad Co. *vs.* Walker, 125 S. W., 99, was decided upon the question whether the sympathy of the jury was excited by the court in instructing them that no recovery could be had for grief and sorrow or loss of companionship.

The case of Gas Co. *vs.* Rogers, 135 S. W. 904, held that sorrow caused by the death of and the loss of companionship of a husband are not proper elements of damage.

The court in Railroad Company *vs.* Golway, 6 App. (D. C.), 144, recognized the rule as established that where minor children have lost a mother through the negligent acts of another the loss of her care, education and training are an element of pecuniary injury, and admitted the application of the same rule to cases involving the death of a father. The court held that "advice and counsel" to three grown sons, the eldest of whom was 34 years of age, while it might be of moral value, would not form a basis of pecuniary damages.

The case of Railroad Co. *vs.* Bentz, 108 Tenn., 670, throws no light on the subject since the error there found was in the action of the court in instructing the jury that it might consider not alone the "advice and counsel" but also the "comfort and enjoyment."

It is submitted that the charge of the trial court is clearly within the well recognized rule as laid down in the leading cases on the subject, which are: Tilley *vs.* R. R. Co., 29 N. Y., 252; Railroad Company *vs.* Wightman's Adm., 39 Gratt., 436; Searle *vs.* Railroad Co., 32 W. Va., 370; Howard *vs.* Legg, 93 Ind., 523; and cases above referred to.

One oft used meaning of the word "care" shows the propriety of permitting the jury to take this element into consideration.

"Charge; oversight or management, implying responsibility for safety and prosperity" (Webster's Internat. Dict., 1895).

"Responsible charge or oversight, often implying concern for safety and prosperity."

"Watchful regard and attention, with a view to safety or protection or to the result or effect; solicitous heed; watchfulness." (Standard Dictionary.)

No one can successfully deny that one who has been deprived of the oversight and management implying responsibility, which conduces to safety and prosperity, has suffered a pecuniary damage. The court in the case at bar very carefully instructed the jury that it must exclude all "damages by way of a balm" and must limit its consideration solely to the financial loss sustained (Rec., p. 48-49).

In conclusion, it is submitted that the railroad company having abandoned at the trial table its constitutional rights as a defense and having also abandoned them in its brief on Motion to Dismiss or Affirm it cannot properly revive these rights for the sole purpose of attempting to give this court jurisdiction, in order that the judgment of this court may be had on certain minor questions, for the determination of which this court has no jurisdiction.

And it is also submitted that as this case is in no wise distinguishable from Employers' Liability cases, 223 U. S., 1, the same ruling should be made herein as therein.

If, however, this court shall see fit to determine the minor questions raised by the Assignments of Error, it is submitted (*a*) that the interpretation sought by the plaintiff can only be had by reading into the statute language which would nullify the purposes of the act and (*b*) that the

charge to the jury was entirely proper for the reason (among others) that the jury were not misled or misled or prejudiced thereby.

Respectfully submitted,

JOHN R. DARBY,
Attorney for Daniel B. Vreeland, Administrator of Estate of Albert Winemiller, Deceased.

JOSEPH D. SULLIVAN,
Of Counsel.

WASHINGTON, *November 25, 1912.*

APPENDIX.

EMPLOYERS' LIABILITY ACT.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason

of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees," approved June eleventh, nineteen hundred and six.

SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury.

(35 Stat. at L., 65, chap. 149; U. S. Comp. Stat. Supp., 1909, p. 1171; 36 Stat. at L., 291, chap. 143.)

MICHIGAN CENTRAL RAILROAD COMPANY v. VREELAND.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 242. Argued December 4, 1912.—Decided January 20, 1913.

If the constitutional questions on which the writ of error was based were not foreclosed when the writ was sued out, this court retains jurisdiction to consider other assignments of error even if the constitutional questions have meanwhile been decided in other cases adversely to plaintiff in error.

The Employers' Liability Act of 1908 will not receive such a narrow interpretation as to defeat all liability because the injured employé survived the injury for a brief period.

Congress has always had power under the commerce clause of the Constitution to regulate the liability of interstate carriers to their employés for injuries; but until it did act, the subject was within the police power of the States. Since the passage of the Employers' Liability Act of 1908, that act is paramount and exclusive and so remains unless and until Congress shall again remit the subject to the States. *Reid* v. *Colorado*, 187 U. S. 137.

A Federal statute upon a subject exclusively under Federal control must be construed by itself and cannot be pieced out by state legislation. If a liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any state legislation on the same subject.

At common law the right of action for an injury to the person is extinguished by the death of the party injured whether death be instantaneous or not. As the Employers' Liability Act of 1908 did not provide for any such survival the right was extinguished by death.

At common law loss and damage may accrue and a right of action accrue to persons dependent upon one wrongfully injured; but this cause of action, except for loss of services prior to death, abates at the death.

The evident purpose, however, of Congress, in enacting the Employers' Liability Act of 1908 was to save a right of action to certain relatives dependent upon the employé wrongfully injured for the loss and financial damage resulting from his death, and there is no express or implied limitation of the liability to cases in which death was instantaneous.

This liability is for pecuniary damage only, and the statute should be construed in this respect as Lord Campbell's Act has been construed,

not as granting a continuance of the right the injured employé had, but as granting a new and independent cause of action.

The pecuniary loss recoverable under the Employers' Liability Act of 1908 by one dependent upon the employé wrongfully killed must be a loss which can be measured by some standard, and does not include an inestimable loss such as that of society and companionship of the deceased or of care and advice in case of a husband for his wife.

There is no hard and fast rule by which pecuniary damages may be measured in all cases.

A minor child sustains a loss from the death of a parent of a different kind from that of wife or husband from the death of the spouse; while the former is capable of definite valuation the latter is not.

In this case the judgment under the Employers' Liability Act of 1908, of damages for death of a husband who survived the injury for a brief period, is reversed, because, although the wife was entitled to maintain the action notwithstanding the death was not instantaneous, the damages were not properly estimated as the court charged the jury that they could consider the relation of husband and wife and the care and advice of the former to the latter.

THE facts are stated in the opinion.

Mr. Emery D. Potter, with whom *Mr. Frank E. Robson*, *Mr. Henry Russel* and *Mr. Charles P. Carroll* were on the brief, for plaintiff in error:

The decision in *Mondou* v. *Railroad Company*, 223 U. S. 1, did not deprive this court of its jurisdiction to pass upon other material and substantial questions raised on this record, its jurisdiction having once rightfully vested.

For construction of the act of April 22, 1908, 35 Stat. 65; and the act of April 5, 1910, 36 Stat. 291, see *Adams* v. *Nor. Pac. R. R.*, 116 Fed. Rep. 324; *Alder* v. *Fleming*, 159 Fed. Rep. 593; *American R. R. Co.* v. *Birch*, 224 U. S. 547; *City* v. *Marfield*, 63 Kansas, 794; *Dolson* v. *L. S. & M. S. Ry.*, 128 Michigan, 444; *Ely* v. *Detroit United Ry. Co.*, 162 Michigan, 287; *Holton* v. *Dailey*, 106 Illinois, 131; *Jones* v. *McMillan*, 129 Michigan, 86; *Kellow* v. *Central Iowa Ry. Co.*, 68 Iowa, 470; *Mulcahey* v. *Washburn Car Co.*, 145 Massachusetts, 281; *Nor. Pac. R. R.* v. *Adams*, 192 U. S. 440, 450; *Nourse* v. *Packard*, 138 Massachusetts,

307; *Oliver* v. *Street Ry. Co.*, 134 Michigan, 367; *Railway Co.* v. *Clark*, 152 U. S. 230; *Railway Co.* v. *Dawson*, 68 Arkansas, 1; *Railway Co.* v. *Dixon*, 179 U. S. 131; *Roundtree* v. *Adams Exp. Co.*, 165 Fed. Rep. 156; *Sawyer* v. *Perry*, 88 Maine, 42; *State* v. *Grand Trunk R. R. Co.*, 61 Maine, 144; *Storrie* v. *Grand Trunk Elevator Co.*, 134 Michigan, 297; *Sweetland* v. *R. R. Co.*, 117 Michigan, 329; *West* v. *Detroit United Ry. Co.*, 159 Michigan, 269; see also Michigan Survival Act, p. 16 and Michigan Death Act, p. 17.

There was error in the charge of the court to the jury as to the measure of damages. *Davis* v. *Guarnieri*, 45 Oh. St. 471; *Gas Co.* v. *Rogers*, 135 S. W. Rep. 904; *Holton* v. *Dailey*, 106 Illinois, 132; *May* v. *R. R. Co.*, 62 N. J. L. 63; *McHugh* v. *Schlosser*, 159 Pa. St. 480; *Nelson* v. *R. R.*, 140 Michigan, 582; *Railroad Co.* v. *Bentz*, 108 Tennessee, 670; *Railroad Co.* v. *Johnson*, 78 Texas, 536; *Railroad Co.* v. *Walker*, 125 S. W. Rep. 99; *Railroad Co.* v. *Wilson*, 48 Fed. Rep. 57; *Railway Co.* v. *Altemeier*, 60 Oh. St. 10; *Railway Co.* v. *Austin*, 68 Illinois, 126; *Railway Co.* v. *Golway*, 6 App. D. C. 144; *Railway Co.* v. *Townsend*, 69 Arkansas, 380; *Steel* v. *Kurtz*, 28 Oh. St. 191; *Sternfelds* v. *Railway Co.*, 73 N. Y. App. Div. 494; *Swift & Co.* v. *Johnson*, 138 Fed. Rep. 867; *Walker* v. *R. R. Co.*, 111 Michigan, 518; Webster's Int. Dict. 1895, see "care," "advice."

Mr. John B. Daish, with whom *Mr. Joseph D. Sullivan* was on the brief, for defendant in error.

The constitutional questions were abandoned by the defendant below at the trial of the case, have since been abandoned in its brief on the motion to dismiss or affirm, and pending hearing of the case have been decided adversely to the contentions of the railroad company.

Assuming that all the questions raised by the assignments of error are properly before and can be considered by this court, they will be found upon examination to be without merit.

Unless the provisions of the particular statutes are distinctly and clearly to the contrary, it is the rule of the Federal and many state courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous. *Roach* v. *Imperial Min. Co.*, 7 Fed. Rep. 606; *Roach* v. *Cons. Imp. M. Co.*, 7 Savy. 224, construing Nevada law; *Metz* v. *Chicago &c. R. Co.*, 85 Fed. Rep. 180, construing Missouri law; *Sternenberg* v. *Mailhos* (C. C. A.), 99 Fed. Rep. 43, construing Texas law; *St. Louis &c. R. Co.* v. *Dawson*, 68 Arkansas, 1; *Murphy* v. *N. Y. &c. R. Co.*, 38 Connecticut, 184; *Mallot* v. *Shimer*, 153 Indiana, 35, construing Illinois law; *Conners* v. *Burlington &c. R. Co.*, 71 Iowa, 490; *Warden* v. *Hunneton &c. R. Co.*, 72 Iowa, 201; *Brown* v. *Buffalo &c. R. Co.*, 22 N. Y. 191; *Parham* v. *Portland Elec. Co.*, 33 Oregon, 451; *Internat'l &c. R. Co.* v. *Kindred*, 57 Texas, 491; *Boyden* v. *Fitchburg, &c. R. Co.*, 70 Vermont, 125; *Van Amberg* v. *Vicksburg &c. R. Co.*, 37 La. Ann. 651; *Hamilton* v. *Morgan's L. &c. R. Co.*, 42 La. Ann. 224; *Legg* v. *Britton*, 64 Vermont, 652.

Of course, where States have so-called "survival acts" and a statute creating a new cause of action (as in Michigan) it would appear to be a salutary rule that an administrator can recover damages under the latter statute only if death is instantaneous, and if the death is not instantaneous he can recover under the former statute. *Sweetland* v. *Chicago &c. R. Co.*, 117 Michigan, 329; *Dolson* v. *Lake Shore &c. R. Co.*, 128 Michigan, 444; *Kyes* v. *Valley Telephone Co.*, 132 Michigan, 231; *Oliver* v. *Houghton S. R. Co.*, 134 Michigan, 367. Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (*Sawyer* v. *Perry*, 88 Maine, 42). In truth, the rule in Michigan and Maine seems to be and justifiably is (by reason of the language of the acts) at variance with the rule elsewhere.

To read into this act (and it is necessary so to do to sus-

ain the propositions in the second and third assignments of error) the word "instantaneous" or "immediate" death would change the plain and unambiguous words of the statute and nullify the beneficent purposes for which it was enacted by the Congress.

There was no error in the instruction that in assessing the pecuniary damages which the widow sustained the jury might consider the relation that was sustained by husband and wife, and draw upon their experience as men, what it would have reasonably been worth to the wife in dollars and cents, to have had during their life together, had he lived, the care and advice of her husband. *Nor. Pac. R. R. Co.* v. *Freeman*, 83 Fed. Rep. 82; *Felt* v. *Puget Sound Co.*, 175 Fed. Rep. 177; *Bollinger* v. *St. Paul & Duluth R. R. Co.*, 35 Minnesota, 418; *Chattanooga R. R. Co.* v. *Clowdis* (Ga.), 17 S. E. Rep. 88; *Mo. Pac. R. Co.* v. *Bond*, 2 Tex. Civ. App. 104.

As to children whose parents are killed, see *Tilley* v. *P. R. R. Co.*, 29 N. Y. 252; *St. Louis &c. R. Co.* v. *Haddry*, 57 Arkansas, 306; *Stoher* v. *St. L., I. M. & S. Ry. Co.*, 91 Missouri, 509; *Walker* v. *McNeill*, 17 Washington, 582.

If the care and guidance and advice of the father is of pecuniary value to the children, likewise is the care and advice of the husband of value to his wife.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action under the Employers' Liability Act of April 22, 1908, to recover damages for the wrongful death of the intestate, an employé in the service of the railroad company. The constitutionality of the act was drawn in question by the plaintiff in error in the court below and this afforded ground for bringing the case directly to this court. Since the allowance of the writ of error all of the constitutional questions have been decided adversely to the plaintiff in error. *Mondou* v. *Railroad Company*, 223 U. S. 1. But this does not justify

our dismissing the case, since the constitutional questions which gave the right to bring it here were not foreclosed when the writ was allowed, and we, therefore, have jurisdiction to consider other assignments of error.

These relate to the construction of the act and the measure of damages thereunder. Sections 1 and 2 of the act of April 22, 1908, 35 Stat. 65, c. 149, and § 2 of the amendatory act of April 5, 1910, 36 Stat. 291, c. 143, are set out in the margin.[1]

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[1] SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2 of the Act of April 5, 1910:

That said Act be further amended by adding the following section as section nine of said Act:

This case, however, involves only a construction of the act prior to the amendment referred to.

The decedent survived his injuries for several hours. His personal representative has brought this action not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death.

For the railroad company it has been argued that the fact that the injured employé survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the act declared a single liability and constituted a cause of action in behalf of the injured person if he survived, or, in case his death was instantaneous, a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the act and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery.

We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative? This is a question which depends upon the statute.

Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury.

We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employés while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States.

Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. "The subject," as observed by this court in *Mondou* v. *Railroad Co.*, 223 U. S. 1, 54, "is one which falls within the police power of the State in the absence of legislation by Congress." *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96, 99. By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employés injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. Thus, in *Gulf, Colorado & Santa Fe Ry.* v. *Hefley*, 158 U. S. 98, 104, it was said, in reference to state legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson* v. *New York*, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise,

for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' *Morgan* v. *Louisiana*, 118 U. S. 455, 464."

It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employés while engaged in interstate commerce this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States. *Reid* v. *Colorado*, 187 U. S. 137, 146.

The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employé, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, "but one which depends on the substance of the cause of action." *Schreiber* v. *Sharpless*, 110 U. S. 76, 80; *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673.

Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured. The rule "*Actio personalis moritur cum persona*" applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in

behalf of an injured employé. That right of action was therefore extinguished. The act has been many times so construed by the Circuit Courts. We cite a few of the cases: *Fulghum* v. *Railway*, 167 Fed. Rep. 660; *Walsh* v. *Railroad*, 173 Fed. Rep. 494.

At common law loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services, before the death, abates at the death.

In *Baker* v. *Bolton*, 1 Campbell, 493, Lord Ellenborough ruled that "in a civil court, the death of a human being could not be complained of as an injury." *Mobile Life Ins. Co.* v. *Brame*, 95 U. S. 754, 756; *The Harrisburg*, 119 U. S. 199, 204.

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds,—"or in case of the death of such employé, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only.

The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act. This act has been, in its distinguishing features, reënacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. For convenience in comparing Lord Campbell's Act with the act of Congress of 1908, the first and second sections of the former are set out in the margin.[1]

In one of the earliest cases which arose under the act, Coleridge, J., said:

"It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93, 109.

In *Seward* v. *The Vera Cruz*, 10 App. Cases, 59, Lord Blackburn said:

[1] Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding such death, etc.

The second section provides that,—

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

"A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss."

But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, § 124; *Louisville, E. & St. L. R. R. Co.* v. *Clark*, 152 U. S. 230; *Read* v. *G. E. Ry.*, L. R. 3 Q. B. 555; *Heckt* v. *O. & M. Ry.*, 132 Indiana, 507; *Foulkes* v. *Nashville & Decatur R. R. Co.*, 9 Heisk. 829; *Littlewood* v. *Mayor*, 89 N. Y. 24; *Southern Bell Tel. Co.* v. *Cassin*, 111 Georgia, 575.

The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. Tiffany, Death by Wrongful Act, §§ 153, 154; *Illinois Cent. R. R. Co.* v. *Barron*, 5 Wall. 90, 105, 106; *Davis* v. *Guarnieri*, 45 Oh. St. 470; *Blake* v. *Midland Railway*, cited above; *Hurst* v.

Detroit City Railway, 84 Michigan, 539, 545; *Munro* v. *Pacific Dredging Company*, 84 California, 515.

The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, Railway Accident Law, § 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In *Tilley* v. *Hudson River Railroad*, 24 N. Y. 471, and 29 N. Y. 252, the court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though greivous and painful to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages."

To the same effect are the cases of *Schaub* v. *Hannibal & St. J. Railway Company*, 106 Missouri, 74; *S. C.*, 16

S. W. Rep. 924, which was followed by the Circuit Court of Appeals for the Eighth Circuit in *Atchison &c. Ry.* v. *Wilson*, 48 Fed. Rep. 57; *Lett* v. *Railway*, 11 Ontario App. 1; *Pennsylvania Railroad* v. *Goodman*, 62 Pa. St. 329, 339; *Railroad* v. *Rush*, 127 Indiana, 545; Tiffany, Death by Wrongful Act, §§ 154 to 162, inclusive; Patterson, Railway Accident Law, §§ 401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In *Lett* v. *Railway*, cited above, it was said (p. 29) in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell—

"That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, Death by Wrongful Act, §§ 158, 160, 161, 162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have

been derived by her from the decedent's earnings. The court did not stop there, but further instructed the jury, that, "In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men and measure, as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physical training, such as when obtained from others must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages. *Tilley* v. *Railroad Co.* and *Lett* v. *Railway Company*, both cited above. If the case at bar had been of such a character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance," for the court said it was a deprivation

to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered.

MR. JUSTICE HOLMES concurs in the result.